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THOUGHTS
ON THE
DISQUALIFICATION
OF THE
ELDEST SONS
OF THE
PEERS OF SCOTLAND,
TO ELECT, OR TO BE ELECTED FROM
THAT COUNTRY TO PARLIAMENT.

WITH AN
A P P E N D I X.

Traced BY
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ADVOCATE AND F.S.S.A.

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THOUGHTS

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TO THE RIGHT OF THE HONOURABLE

THE LORDS OF THE PARLIAMENT



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EDINBURGH

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1841

TO
THE MOST NOBLE
WILLIAM HENRY CAVENDISH,
DUKE OF PORTLAND,
&c. &c. &c.

WHOSE POLITICAL PRINCIPLES
AND
PUBLIC CONDUCT
MARK THE PATRIOT AND CITIZEN,
THE FOLLOWING TREATISE
IS
MOST RESPECTFULLY INSCRIBED.

THE MOST

WILLIAM

DURE OF

WHICH POLITICAL

YUEN

MADE THE

THE FOLLOWING

AND

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THOUGHTS, &c.

“ The Commons consist of all such men, of any property in the kingdom, as have not seats in the House of Lords, every one of which has a voice in Parliament, either personally or by his representatives.”

BLACKSTONE'S COMMENT. on the Law of England.

IT is the glory of the British constitution, that it is founded not on force or fear, but on justice, or a regard to the rights and happiness of mankind. It professes to secure the property and the privileges of every man; to enforce claims, and to redress injuries. This spirit of equity diffuses a benign radiance around the majesty of government, and establishes the thrones of kings on the firmest foundations. Despotism, which aims, not to se-

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cure,

cure, but to command and seize private property, produces in the sovereign, inconsistency and capriciousness; in the subject, distrust and *dis*-affection. It debases and enervates the mind, destroys good faith and every virtue, and, by means of oppression on the one hand, and a desire of change on the other, prepares the way for the most dangerous and fatal revolutions. Mild and free governments, on the contrary, secure possessions and honours, stimulate exertion, nourish hope, and attach the human heart to the authority of guardian and equal laws, with a kind of filial confidence and affection.

Forms of government are not exempted from that change and revolution to which Fate has destined every thing that is human. But that their duration may be prolonged to the latest possible period, it is proper, on every occasion of deviation, to
reduce

reduce them, as nearly as they can be reduced by political wisdom, to their first principles. This, in governments that depend on fear, and a superstitious reverence for antient customs and names, may not always be an easy task; since the darkness in which both these passions consist is gradually dispelled by the progressive light of knowledge. But, in the British constitution, there is a perpetual spring of self-recovery and reformation; reason and justice being immutable and eternal. The British legislature, by cutting off the excrescences of injustice and oppression, whether to the community or particular sets of men, and whether introduced unawares by custom, or solemnized by positive institution, has, at different times, infused new vigour into our civil constitution. By authority thus exercised, legislators promote a respect for justice, secure liberty to every class and

condition of men, and consult the public good in the very highest degree to which patriotic virtue can reach: since it is universally allowed, that the greatest benefit which men can bestow on men, is, the establishment of such equal and wise laws as shall be a constant source of private happiness, and public prosperity.

Let it not be imagined that the refusal of justice to one order of men, is, to those who are in the full enjoyment of all their rights, a matter of indifference. Example has a wonderful power of multiplication. Depart from the spirit of our constitution in one instance, and you have a pretext for departing from it in another. Thus precedents, accumulated into laws, have, in different ages and countries, converted free into arbitrary governments. In proportion as ideas of disfranchizing and oppressing any class of men, become familiar,
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in that proportion are new avenues opened for the exercise of injustice, faction, and tyranny. Every act of justice, on the other hand, but especially every reparation of injustice, is an homage paid to the genius of Freedom, and adds fresh vigour to our political system.

I have been led into these reflections by frequently revolving in my mind the supposed disqualification (for it is not statutory) of the eldest sons of the peers of Scotland to elect, or be elected from that country to parliament: a subject, which a late event in the House of Commons* naturally recalls to the mind of all who are either particularly interested in the rights and privileges of that order of men, or concerned, in general, in the preservation

* Lord Elcho's vacating his seat for a district of Scotch burghs, in consequence of his father's succession to the peerage of Wemyss.

preservation of that equal spirit of freedom and justice, which is the animating principle of the British government.

On the occasion of such an event, it is not unnatural to take a general retrospect of the origin, progress, and present state of the parliamentary representation of Scotland; to trace the circumstances of the times by which the eldest sons of the great barons, or Peers of that country, came to be excluded from that privilege; to weigh the legality and the force of those decisions by which their exclusion has been effected; and to consider, whether their restoration to the privileges of their fellow-citizens, would, at the present moment, be either inconsistent with the genius of our government, or with political expedience.

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In all kingdoms where the feudal system has been established, a striking similarity is observed in the original constitution of their general conventions or parliaments. These assemblies were at first composed of the immediate vassals of the prince or chief, who were *all*, indiscriminately and without exception, bound to give personal attendance when required: a condition which formed at that time, a part of the political system, though it afterwards, from varying circumstances, underwent in *the* several countries various alterations. A strong similarity is also apparent, not only in the original constitution of the parliaments of England and of Scotland, but likewise in the changes which were introduced into those meetings afterwards; and whether it arose from mutual intercourse in peace, or fierce inroads in war, Scotland, in process of time,

time, adopted the innovations which had previously taken place in England.

The commercial genius which pervaded this nation, and which it cultivated with great success, increased the consequence of the people, and there produced those alterations at an earlier period, which the influence of the aristocracy, or great vassals of the crown retarded in Scotland, until the monarch seized the favourable opportunity of converting them into engines of controlling that very power, by the predominancy of which their introduction had, for a time, been prevented.

Nor was the political resemblance between England and Scotland confined to the constitution of parliament alone.*

Glanville's

* The obscurity in which the more antient history of Britain is involved, renders it difficult to trace with accuracy,

Glanville's Treatise on the Law of England, and the Regiam Majestatem on that of Scotland, are, in their provisions, almost similar. The chief dispute on this subject among antiquaries, is, which of the two treatises is the oldest.* The practice also, in Scotland, of appointing certain officers on this side, and beyond *Forth*, and that in England, on this side and beyond *Trent*, took place probably in imitation of each other. This passion of imitation, so natural to mankind, derived additional force from the situation of the island, and its consequential *dis*-connection, in *former* times, with the kingdoms on the continent.

In both countries, the constituent members of parliament, who were bound, in the true

B

spirit

racy, that *original* connection, which the same language, (that of Wales and the Highlands of Scotland excepted) the same manners, customs, and subsequent alterations, demonstrate; and of which many instances might be given.

* See Essays on British Antiquities, Essay I.

spirit of the feudal system, to give their personal attendance in those assemblies, were, the *libere tenentes*,* under which denomination were comprehended the *great nobles*, as well as the lesser barons or freeholders. It is immaterial to enquire at what period the king's burgessees were admitted into parliament. This latter class, however, were known to sit there by representation, long before that of lesser barons or freeholders within the shires. In each of the two kingdoms, the aristocracy, or great barons, acquired a decided pre-eminence, and the lesser barons, uneasy in those assemblies, in their inferior situations, began to absent themselves from the meetings of parliament. In both kingdoms, the respective monarchs endeavoured to counteract the over-grown weight of the *great*, by means

* Although the feudal system thus limited *parliaments* to the crown vassals, *the national assemblies*, before the ~~the~~ *establishment* of that system, appear to have been more extended. Nor until then, had the word *parliament* occurred in Britain.

means of the attendance of the *lesser* barons, who were exempted from the obligation of personal attendance, on condition of their sending representatives from each shire or county in the kingdom.

In England, the fortunes acquired by commerce, raising their possessors from situations of obscurity within the recollection of the nobles, and operating on the patrician pride of this order, was, in all probability, the principal cause of the division of parliament into two distinct houses. This circumstance, with that *controul* which the commons afterwards acquired over the public purse, has ripened into a constitution that has long been the admiration of the world. In Scotland, again, where the people had not acquired a spirit of industry, the power of the great barons remained unchecked. In the proceedings of parliament their

influence was still supreme and unrivalled. There was not, of course, the same motives as in England, to occasion the separation of parliament into different houses. Their predominant power in the national assembly, joined to the arbitrary extent of their hereditary jurisdictions, invested those feudal chiefs with the actual government of the kingdom.* These private jurisdictions having been reserved by the Union, it was not until 1747 that they were *re-assumed* by the crown. Their injurious consequences to the safety of the kingdom were displayed in those desperate attempts, which had taken place in favour of the house of Stuart. “ And, being
 “ deemed

* Mr. Hume, in his History of England, vol. 6, p. 353, anno 1641, observes, that, “ The English were
 “ at that time a civilized people, and obedient to the
 “ laws; but among the Scots, it was of little consequence
 “ how the laws were framed, or by whom voted, while
 “ the exorbitant aristocracy had it so much in their power
 “ to

“ deemed private property, it was remark-
 “ ed that their holders might part with
 “ them for an equivalent. They were
 “ accordingly re-annexed to the crown,
 “ by 20 Geo. II. c. 43: and one hundred
 “ and fifty thousand pounds bought back
 “ to the nation the justice and freedom
 “ which had passed away from it.” It is
 from that period only that the people in
 Scotland can be said to have been real par-
 takers of the British constitution.

The parliament of Scotland was
 thus composed of all who held landed
 property, *in capite*, of the crown; who
 were bound to attend in that assembly,
 whatever

“ to prevent their regular execution.” It is immaterial
 whether that aristocratical influence was possessed by peers,
 or by commoners of great estate. Before representation
 was introduced, they sat equally in parliament; and af-
 ter that introduction, they were certain of being elected
 when they desired it.

whatever might be the extent or value of their property.* This duty came soon to be considered by those in possession of *small* estates, not so much in the light of an honourable privilege, as in that of an oppressive obligation. It was a long time even in England, before men came to entertain ideas of the importance of *seats* in parliament: but in Scotland, where those assemblies were still ambulatory with the king, and

* See Mr. Wight on Elections, 4to, Edin. p. 49.—By 1425, c. 52, it is enacted, “ That all prelates, “ erles, barronnes, and freeholders of the king with- “ in the realme, sin they are halden (since they are “ bound) to give presence in the king’s parliament, and “ general council, &c. &c.” And by 1489, c. 16, “ The “ free tenants of the prince, (the king’s eldest son) were “ ordered to give suit and presence in parliament, until “ the king should have a son to answer for them therein.” Robert III. had erected certain lands into an *appanage*, for the eldest sons of the kings of Scotland, which was called *the principality*. The titles of the prince are, Duke of Rothsay, Earl of Carrick, Baron of Renfrew, Earl of Ross, Lord of the Isles, and Great Steward of Scotland.

and held generally within the walls of one of his fortresses, and where the pre-eminence of the *great* so far eclipsed the consequence of the *lesser* barons and the burghesses, the obligation of personal attendance must have appeared still more irksome.

The great barons, on the other hand, were naturally flattered by the privilege of personal attendance, and justly accounted themselves the hereditary advisers of the prince, and the directors of the affairs of the nation.

James I. of Scotland, desirous to relieve his small barons from the burdensome obligation just mentioned, and at the same time to secure the attendance of a certain number of them at least, as a counterpoise to the great barons, had influence to get it enacted by 1427, c. 101: *item*, "The
" king

"king with the consent of the haill
 "council generallie, has statute and or-
 "dained that the small baronnes and free
 "tenants need not cum to parliament
 "nor general councils, swa that of ilk
 "shiref-dome, there be sent, chosen at the
 "head-court of the shiref-dome, twa or
 "mae wise men after the largeness of the
 "shiref-dome, the quhilk sall be called
 "the commissaries of the shires." It seems
 to have been intended, at the same time, to
 have modelled the parliament of Scotland
 on that of England; the act here quoted
 further providing, "and be thir commis-
 "saries of all sall be chosen ane wise man
 "and expert called *the common speaker of*
 "*parliament*, the quhilk sall propose all and
 "fundrie neids and causes pertaining to
 "the commouns in the parliament or
 "general councill."* This act of parlia-
 ment

* This monarch, who had been educated in England,
 and who appears to have been greatly interested in the im-
 provement

ment does not, however, appear to have produced a more regular attendance of the lesser barons, who not only seem to have given up personal attendance, but also to have been negligent in sending their commissioners. It is also to be remarked, that it did not determine what constituted a *great or parliamentary* baron, or define those who were exempted from personal attendance. That distinction was afterwards, by 1457, c. 75, confined to such as were possessed of an estate valued at 20*l.* which rate or standard was, by 1503, c. 78, extended to one hundred merks, thus, “*item,*
 “ It is statute and ordained, that frae
 “ thenceforth, nae barronne, freehalder,
 “ nor vassal, quhilk are within one hun-

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“ dred

provement of his kingdom, was prevented from completing the division of his parliament into separate houses, by his untimely fate. Nor did the commons afterwards exercise the privilege of choosing a speaker. The whole members continued to sit in one assembly, and the chancellor was, from his office, *president of the parliament.*

“dred merks of this extent that now is,
 “be compelled to cum personally to the
 “parliament, but if it be (unless) that our
 “soveraine lord write especially for them,
 “and swa not to be unlauwed for their
 “presence, and they send their procura-
 “tors (proxies) to answer for them with
 “the barronnes of the shire, * or the maist
 “famous persons, and all that are above
 “the extent of one hundred merks, to
 “cum to parliament under the pain of an
 “auld outlaw.” †

By 1587, c. 114, which in its conse-
 quences established the *representation* of the
 lesser

* There is also a distinction to be made between the
peers of parliament, and the *barons of the shires*, who, by
 1587, c. 114, came to be all included under those *barons*
and freeholders who were, in future, to act only by repre-
 sentation. The freeholders or voters in the counties are
 still, in Scotland, called the barons of the shires.

† Various acts of the Scottish parliament appoint fines
 to be levied from those who absent themselves from their
 attendance in parliament.

lesser barons, on a recital of 1427, c. 101, and, by which, proceeding upon the same motives of obtaining a counterpoise to the sway of the great barons, (considerably increased since the Reformation, through the abolition of the abbacies) * *all barons and freeholders, under the degree of prelates and lords of parliament (or peers) are appointed to send commissioners to parliament, and the right of voting at their elections is limited to freeholders having fourtie shillings land in free tenandry balden of the king; and who have their actual dwelling and residence within the same shire.*†

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Great

* Wight on Elections, p. 58. Essays on British Antiquities, p. 42. The representation of the church in parliament, although restored after the Reformation, was finally abolished by 1689, c. 3, and the presbyterian form of church government was confirmed at the *Union*.

† Before that period, all freeholders whatever of the crown within the shire, might have voted at the elections of the commissioners, and were obliged to contribute towards

Great opposition was made to that act, on the part of the nobility; some of whom even protested against it, though in vain.

Although, in the original constitution of parliament, every proprietor who held of the crown, was obliged to give attendance when required, yet the progress of population, and the increase of freeholders from the division of property, must have,

wards defraying the expences of their commissioners while attending in parliament, and this was continued down to the *Union*. All those acts above-mentioned were intended to favour the lesser barons. Attendance in parliament was an obligation on the lower vassals, and to be relieved from the obligation of that attendance was, at that period, to be so far benefited. After 1587, c. 114, the lesser barons, although that act did not in express terms disqualify them, sat in parliament by representation only; and whether or no they were, after that *period*, entitled to have attended in *person*, as they had done after the act 1427, c. 101, in the meetings of parliament and conventions, particularly that in 1560, is now a point which the provisions of subsequent statutes have rendered of little moment.

have, sooner or later, led, not only to the introduction of parliamentary representation, in order to have prevented tumultuous assemblies, but also to a limitation of the right of voting at the election of those representatives. And, independently of the original limitation to *crown vassals*, the most natural, distinct, and permanent standard or measure by which the right of voting in the shires can be determined, is the possession of *land*: a species of property that best enables the legislature to define *who* may be entrusted with the privilege of an elector, and *where* that privilege is to be exercised; for a person, in possession of property within Yorkshire, is not in virtue of that property, to vote in Middlesex.

It is also a principle in the institution of parliamentary representation, that every man who votes in the election of a representative,

sentative, shall be supposed, on reasonable grounds, to have a *will* of his own.* Now the grand basis of independent and free will is property. It is through this medium, that the legislature is to ascertain those citizens who may be supposed to possess a free and independent will, when it shall have become necessary to form a limitation in the qualification of the elector; nor should that restriction be too far extended, nor removed from the acquirement of moderate industry. Accordingly, this is the first instance of a limitation in Scotland, in the extent of qualification requisite to entitle a crown vassal to vote in the election of the commissioners of the shires, and except in the tumultuous reign of the unfortunate queen Mary, is the first legal intimation † that occurs of an alteration of sentiment

* Blackstone.

† On the meeting of estates in 1560, the lesser barons and freeholders, having petitioned parliament respecting their

timent with respect to the obligation of parliamentary attendance.

The act of 1587, already mentioned, occasioned, in a little time, a very great alteration in the constitution of the parliament of Scotland. Personal titles of peerage, their right to sit in that assembly, were admitted, and attended in great numbers. The situation of Scotland, at that period, rendered a seat in parliament for the time a valuable privilege. They did not therefore, at that time, take advantage of the provision by 1427, c. 101, in their favour, by which they were entitled to have sent representatives. See Mr. Wight, p. 32. Many eldest sons of peers sat in the meeting of the states in 1560, whose fathers were also present, and who, of course, did not derive their title to a seat in parliament, from their being only proxies for their fathers. Mr. Wight p. 269. A copy of the above petition, and of the roll of those present in that meeting is inserted in the Appendix, No. I. and II. By this it will appear, that the names of the eldest sons of peers of parliament, who were present, and sat as members, are included among those of the lesser barons and freeholders. They had also repeatedly sat in former parliaments in the character of *members*.

peerage having been introduced into that country, a natural love of distinction conspired with that principle of imitation, which has so large a share in the government of human affairs, to *confine* personal attendance in parliament, without any consideration of property, in like manner as had formerly taken place in England, to such of the tenants *in capite*, as the will of the sovereign had raised to the rank of *nobles*; although that act of parliament, as well as the former act, 1427, c. 101, were on that subject silent. From that period all other freeholders sat by representation only. Many proprietors of considerable estates, on whom that dignity had not been conferred, were accordingly prevented from attending in future in *person*. These barons had seen with envy, the distinction which had been thereby occasioned. They were hurt by this sudden inferiority,

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in a country at that time purely *feudal*. The want of industry, and the poverty of the people, adding force to the impression thus made on their minds, they were anxious to distinguish themselves from the mass of the *lesser barons* and freeholders, with whom they saw themselves confounded.* Accordingly, on a recital, that the shires and stewarties had been in use to be represented in parliament and conventions, many regulations were made by 1681, c. 21, for preventing improper voters at the meetings of elections: and that aristocratical spirit being then prevalent, which still has a powerful influence, and pervades the whole constitution of Scottish elections, the original spirit of the

D constitution

* The additional restrictions in the 16 Geo. II. c. 11, s. 8, &c. as well as the unwillingness still shewn in Scotland to extend the right of voting, seem to proceed on similar motives.

constitution of parliament was still farther departed from, and the right of voting was confined to those possessing, "and publickly infest in a fourtie shilling land of *old extent*, or in the superiority of lands liable in payment of publick burdens for his majesty's supplies, to the extent of 400l. valued rent."*

The

* This extent of qualification is further confirmed by 16 Geo. II. c. 11, &c. The requisition in the act of 1681, c. 21, that the fourtie shilling should be of *old extent*, was also restrictive of that of 1587, c. 114. Previous to the introduction of the valued rent, in the reign of Charles II. various *extents* or proportions, upon which the feudal casualties were paid, had been from time to time appointed. The last of these was called the *new extent*; and having been instituted previous to the act of 1587, there is reason to suppose, from the expression of that statute, that the right of voting was not by that former act confined to the *old extent*. The limitation in the act of 1681 to the *old extent*, is, however, analogous to the restriction of *valued rent* in the same statute; the land-

The introduction of personal titles of peerage and of representation, had in like manner produced in England a numerous class of barons and freeholders, who were thereby prevented from continuing to sit in parliament in *person*. Had the government of that country remained equally aristocratical with that of Scotland, and the people equally unindustrious, we would have seen, there, in all probability, a similar *restriction* of parliamentary representation. But the vein of industry, the wealth, and the consequence which the people acquired, prevented an effect so fatal to freedom. The more wealthy of the barons, now deprived of *personal* attendance, felt rather a pride in being at the head of the commoners. They found a numerous body

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of land-tax having been, previous to the introduction of the valued rent, raised in Scotland, although the feudal casualties were not, on the *old extent*.

of men increasing in consequence and weight. The intimate connection between an extended representation, and the exertions of industry in a free country, was unfolded; and the circumstance, of the division of parliament into separate houses, had already fixed the political existence of the people. Having become members of a separate house of parliament, the freeholders in the shires soon felt their consequence, and were encouraged to extend the privileges they enjoyed; to which they were also induced by the number of royal boroughs whose inhabitants had already become respectable. Sensible of that importance which was derived from the union of many individuals, instead of reducing the number of voters, they retained the original limitation of a *fourty shilling* freehold, without even making any alteration (which the principles of the British constitution, and perhaps the respectability

respectability of the situation of an elector, would have warranted) in that qualification in proportion to the decrease in the value of money; and thus the number of voters were gradually increased, by means which were as certain, as they were slow and imperceptible.*

The limitation which took place in consequence of the act of the Scottish parliament just mentioned, was also promoted by the inclination and views of the sovereign. The measures of the crown, in that country, though they were

* While the valued rent (or calculation on which the qualification of a voter, and the proportions of the land-tax to be paid by land-holders, are now ascertained) remains the rule of that qualification in Scotland, it is scarcely possible that any alteration, in consequence of the decreasing value of money, can take place; as it is probable that the improvements on estates will, on the whole, be proportioned to their situations at the time when their value was fixed.

were still calculated to reduce the influence of the great barons, had undergone some alterations. It had been found in England, that to increase the weight of the *people*, not only operated as a counter-balance to that of the great barons, but also diminished the prerogative and influence of the king.* In order to avoid a similar consequence in Scotland, a lesser aristocracy was to be played off against the great barons. Those among the lesser barons of most considerable estates, were to advance in competition with the peers of parliament. These parties were to display their mutual jealousies and contentions; while the sovereign was to preserve his pre-eminence and weight undiminished; and the smaller proprietors of the country, and the great body of the people were to be annihilated in their parliamentary

* Bolinbroke on the History of England, letter 12th.
Henry VII.

liamentary character, and were still to remain in the back ground. Accident, or perhaps a desire to mark, that tenants of the *crown* were, as formerly, alone to enjoy a share in the *representation*, occasioned the limitation in the above-mentioned act of parliament to *superiority*: yet the expression in that of 1587, c. 114, *in free tenandry balden of the king*, would have been equally expressive; and might have, in a great measure, prevented the evil of nominal and fictitious voters *now* so loudly cried down. It might have presumed the necessity of property and superiority being joined. No instance of a vote upon a *bare* right of superiority, had in all probability occurred till sometime after the act of 1681, for regulating elections, was passed.

Previously to 1587, c. 114, when the representation of the lesser barons was established,

established, the eldest sons of peers could have sat in parliament, not as eldest sons of peers, but as *tenentes in capite* of the crown; * provided they were in possession of estates held independent of their fathers or other intermediate superiors. Nor is there a single act of the Scottish parliament by which, when *qualified* according to the representation established by those acts above mentioned, they are excluded from the right of sitting in parliament. In what situation then are they placed? And to what class of citizens do they belong? Are they comprehended in the

* Dr. Gilbert Stuart, who has written in the spirit of controversy, maintains, that those freeholders alone who were in possession of a whole knight's fee, were to attend in parliament; and that the obligation to do so, did not extend indiscriminately to all tenants *in capite*. But whatever weight the acts of parliament, 1425, c. 52, and 1427, c. 101, above mentioned, may have in the scale of the opposite opinion, the situation of peers eldest sons, in possession of a whole fee held *in capite*, remains the same.

the rank of prelates and lords of parliament? All other barons and freeholders are appointed to attend in future by *representation*. Did the obligation, then, of their personal attendance remain? And, after that period, were they entitled, with their fathers, to an hereditary seat? Yet they are held to be disqualified from electing, or being elected into parliament from Scotland, on grounds which shall by and by be mentioned.

One other act of parliament still remains to be considered, that of 1661, c. 35, which gives “ a right of voting at
 “ the elections of the commissioners, or
 “ to be elected as such, to all freeholders
 “ of the king to a certain extent, except-
 “ ing always from this act, *all noblemen*
 “ *and their vassals.*”

It is impossible to reduce the eldest sons of the great barons, in all situa-

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tions,

tions, within the meaning and the reach of this clause of disqualification, by any fair construction. By the term *noblemen*, in this clause, is clearly understood the great barons or peers who sat in parliament in person, who had not been disqualified from voting at elections by the former acts of the legislature, appointing the representation of the lesser barons, and whose privilege of voting in the election of commissioners, since they themselves sat personally in parliament, it seemed proper to abolish. When vassals of the nobility, their sons were undoubtedly excepted; but the term *noblemen*, in the act just quoted, did not include any species of *tenants in capite* who did not sit personally in parliament. The constitution of Scotland had preserved, at least in criminal cases, a trial by a jury of equals. If the eldest son of a peer of Scotland committed a crime, however the
courtesy

courtesy of the kingdom might have considered him as *noble*, he would not now be tried by the *peers*; for they are not his *pares curiæ*: he would be tried by a jury of commoners, perhaps indiscriminately chosen. And he was not formerly, in the construction of jury in that country, to be considered as among the *pares curiæ* of the peers of parliament, any more than of the lesser barons and freeholders. They sat mutually on each others juries; nor was the obligation, as in the trial of peers of parliament, that two-thirds of the jury should be *peers*, extended to their eldest sons.* Why therefore extend that disqualifying expression of 1661, c. 35, to them? Nor is it sufficient to say, that before the year 1587 they sat as *proxies* † for their fathers. The rolls of the meeting of the estates in 1560, and of previous parlia-

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ments,

* See Appendix, No. III. † Mr. Wight, p. 269.

ments, evidently show that they also sat in those meetings in the character of members, and as tenants *in capite*.

If the great barons, before 1587, possessed the privilege of voting by proxy, they possessed it not exclusively, but in common with the lesser barons and freeholders. By 1425, c. 52, it is ordained and statute, " That all prelates, erles, bar-
 " rones, and *freeholders* of the king, with-
 " in the realm, sin they are halden to give
 " presence in the king's parliament and ge-
 " neral council, frae thencefoorth, be hal-
 " den to compeir in proper person, and
 " not by a procurator, (proxy); but, give
 " the procurator alledge there, and prove
 " a lawful cause of their absence." It is also probable that a proxy might have then been held by any member of the assembly.*

But

* On this subject of proxies, see Wight on Elections, p. 50, and App. No. IV. where there is an instance of a
 letter

But at that period a single voice was of little weight in the parliament of Scotland; and therefore it is natural to suppose, that the privilege of voting by proxy would be but seldom claimed.

Though the eldest sons of the peers of parliament, after 1587, ceased to sit personally, or to appear as proxies for their fathers, yet they were not annihilated as tenants *in capite*, nor could they in that character have been included in the clause of disqualification above mentioned.

From thenceforth the proxies of the great barons could be held only by the peers of parliament; * and, if their eldest

letter of procuration or proxy from the abbot of Kelso, with consent of his chapter. It was given to two separate men to vote for him in parliament.

* The representatives of the lesser barons ceased to exercise the privilege of voting by proxy, which had been previously

est sons retained the privilege of attending the meetings of parliament, it was similar to the right enjoyed by the sons of the nobility in England, of standing behind the throne in the house of peers. But neither the eldest sons of the Scottish, nor those of the English peers, though indulged with liberty of personal attendance, were permitted to argue or vote in the motion or question in discussion. The principle on which that privilege was granted, or came to be possessed by the sons of peers, whatever it may have been, cannot be supposed to have been affected in any degree by the circumstance, that the parliament of England happened to be divided into two separate houses. And with regard to criminal trials, if the eldest sons of peers are not,

in

previously enjoyed by them when sitting in person. Having become delegated commissioners, on the introduction of representation, they were not allowed to sub-delegate.

in Scotland, since the Union, appointed to attend on juries, (for in that country trial by jury in civil causes has long ceased) this circumstance also perfectly coincides with what takes place on this subject in England. And, in both countries, the reason of the practice, which arises entirely from *courtesy*, is precisely the same: not incapacity or disqualification, but *propter honoris respectum*. The right of trial by jury, * is, however, a privilege of the greatest importance; nor is there any class of men, however dignified their rank, that would not in the exercise of that privilege be honoured. It was not till the year 1710, that the peers themselves were, in Scotland, by 8 Ann. c. 14, relieved from attending on the judges at the assizes.

Nor can any argument be drawn against the parliamentary rights of that body of men,

* See Appendix, No. III.

men, from their rank and precedence in society. The act of parliament, 1695, c. 10, which fixed the different proportions of poll-tax in Scotland, after stating what lesser proprietors and others were to pay, enacted, " That all heritors of one thousand pounds of valued rent, and above the same, and all knights baronets, and and knights, be subject and liable to *twenty-four* pounds of poll-money, and that they pay for each of their children *in familia*, three pounds.

" That all lords pay 40l. of poll-money.

" That all viscounts pay 50l.

" That all earls pay 60l.

" That all marquisses pay 80l.

" That all dukes pay 100l.

" That the sons of noblemen pay according to their rank, viz. all dukes eldest sons, as marquisses, and their youngest sons as earls; all marquisses eldest sons as earls, and their youngest

" as

“ as viscounts; all earls eldest sons as
 “ viscounts, and their younger sons shall
 “ be liable in *twenty-four* pounds of poll;
 “ all viscounts and lords sons shall be li-
 “ able in *twenty-four* pounds of poll.”

By this it appears that all viscounts and lords sons, whether elder or younger, were held *equal*, only, in that tax, to *heretors* of one thousand pounds of valued rent; and that, if precedency was given to the eldest sons of dukes and marquisses, it was also given to their youngest sons, who had never been held to be disqualified. Now, if the idea of a *quasi* peer * can be entertained for a moment, how came it to pass that the younger sons of dukes and marquisses were not also held to be compe-

F hended

* Spottiswood, says Mr. Wight. p, 269, ascribes their disqualification to their being held *quasi* peers, and heirs of their fathers: the idea of a peer *quasi* is too absurd to be attended to; and, at any rate, what has that to do with their situations as tenants *in capite*?

hended under *noblemen*, in 1661, c. 35, and to be disqualified under that idea, since they enjoyed precedency as well as the eldest?

In the parliament of Scotland, where the three estates of the realm sat and voted in the same assembly, a question could have been carried by a plurality of voices against the unanimous dissent even of that estate to be thereby affected. *--- On passing the act of parliament, 1672, c. 5, respecting the privileges of the royal boroughs, the borough commissioners with one voice dissented. And in 1649, on passing the act for allowing the value of annual rents, those commissioners rose, and

* In the parliament of Great Britain a similar rule takes place in the House of Peers, in the votes of the lords spiritual and temporal; and in the House of Commons, in those of the county and borough members. On the suppression of church representation, the three estates of the parliament of Scotland were, the nobility, the commissioners of the shires, and the burghs.—1690, c. 3.

and left the parliament; * yet those acts were both passed into laws.

The idea of obligatory attendance in parliament, which had been entertained by the lesser barons when that *representation* was more extended, having thus, on its restriction to a *few*, in a great degree ceased, they now lost sight of the inconvenience of attendance, and, viewing it in a more favourable light, began to consider it, not so much as a burden as a valuable privilege. The exclusion of the eldest sons of the great barons, therefore, under the forced construction, as will appear from the resolutions afterwards mentioned, of their being represented * by their *fathers*, in an assembly constituted like the parliament of Scotland, where the three estates

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fat

* See Sir G. Mackenzie's Observations on the Acts of Parliament of Scotland.

† Wallace on the Peerage of Scotland, p. 426.

fat in a collective body, where a vote could have been carried against the unanimous dissent even of the state to be thereby affected, and in which the nobility, from the political situation of the country, had so great an influence: the exclusion of the eldest sons of the great barons, I say, in such circumstances as these, to the lesser barons whose share in the representation was still reserved by the act of 1681, c. 21, appeared justifiable, though not by law, yet, perhaps, by political necessity. If, however, the eldest sons of Scotch peers had been capable of being elected to represent the lesser barons and burgesses in parliament, it was not as *eldest sons* and *heirs* of their fathers, but as *freeholders*; and the same reason that would in that case have disqualified them, namely, their being represented by their fathers, would have also disqualified the son of any member of parliament whatever. In the character of freeholders, they stood uniformly in

in the same situation. But the sons of other members were not disqualified, for in 1685, when Sir G. Mackenzie was created Lord Tarbat, both father and son were then in parliament. The sons of all who sat in parliament would have been in like manner represented by their fathers; and whether sons of peers, or others, when elected into parliament, they must have been equally chosen by the freeholders, who sat *not* in person, and, not by the peers who did.

The acts of parliament above mentioned provided, that the expences of the parliamentary commissioners from the shires, should be defrayed by the barons and freeholders represented. For this purpose it is enacted by 1661, c. 35, and confirmed by 1681, c. 21, " Likeas his Majesty with consent foresaid, statutes and
 " ordains the whole heritors, life-renters,
 " and wode-setters within each shire and
 " stewarty,

"stewarty, to contribute for the charges
 "of the commissioners thereof, accord-
 "ing to their valuation, (the rent of
 "their estates in the cefs or tax book of
 "the county) except only those who hold
 "of noblemen or bishops, or lands be-
 "longing to boroughs royal in burgage, *
 " and

* The inhabitants of the burghs royal were, in like manner, bound to defray the expences of their parliamentary commissioners, who, for a long time past were, and still are elected by the town-councils of the burghs, and not by the burgesſes. The town-councils alſo chuſe their ſucceſſors in office, whoſe number in Edinburgh is 33, in Glaſgow 29, and in Aberdeen 19. Thus the moſt populous towns in Scotland are thereby at the ſole and perpetual diſpoſal of a very inferior proportion of the inhabitants, double the above-mentioned number of the council in the ſame intereſt, and dependent for their official importance on each other, being ſufficient for that purpoſe. Nor is there any controul over the management of thoſe men, as appears from the late deciſions of the ſupreme courts of that kingdom.

The animated exertions which the burgesſes are now making in Scotland, are applied to the correction of ſo
 unequal

“ and also the expences of the foot-mantles.”†

It may perhaps be said, that this exemption in favour of noblemen and their vassals, afforded some colour of pretext for the exclusion of the eldest sons of the great barons from parliament. But, if so argued, when that obligation to defray the expences of the commissioners ceased, all shadow of that reason will fall to the ground.

unequal a system. They demand not a reform—but the re-establishment of their antient constitution, as it existed previous to 1469, c. 19.—They claim a share in the election of their magistracy, an opinion on the necessity of their contributions and town taxations, and an investigation of their annual charges and accounts. But they interfere not with the election of their parliamentary commissioners.

† The foot-mantles were fine carpets, which were spread where the procession or *riding* of the parliament was to pass.

ground. It is farther to be observed, that a disqualification on the ground of exemption from the expences just mentioned, would also have extended, by parity of reasoning, to their younger sons. Neither is that reason of exclusion applicable to burghs royal; for their eldest sons being once created burgessees, and in possession of property within the burgh, would, *ipso facto*, have become liable to their proportion of the burgh stent (or tax) for defraying the expences of their parliamentary commissioners. The genius of those times left, indeed, but little room for the exemplification of the case here stated. But times and manners are constantly undergoing alteration: and, at any rate, no disqualification of their eldest sons from being created burgessees, actually existed. And suppose even that the eldest son of a peer of parliament, previously to the Union, when

when the obligation to defray the expence of attendance in parliament determined, had been in possession of an estate holding of the crown, distinct from his father's, and not erected into a *fief-noble*, would he not have been liable, in the proportion of that estate, to have contributed towards the expences of the commissioners from that shire within which his estate was situated? And if so, the above reason of exclusion could never even have had a real existence.

The intent and meaning of that act, 1661, c. 35, however, seem to be, that difficulties having occurred in determining by whom the expences of those commissioners should be defrayed, the act was framed in order to settle that point, by determining who were their constituents. The great barons or noblemen, and the bishops, sat in parliament in person, re-

G presented

presented the land held in vassalage of them, and were the crown vassals of those estates.* They and their vassals had refused to contribute towards the expences of the commissioners sent by the lesser barons. Accordingly, that act of parliament excepted their estates from contribution, and, in return, provided that those only who contributed to that expence, should have a vote at the election of the commissioners. The eldest sons of peers could not claim to vote as such. Unless they possessed an estate *in capite*, they were not freeholders, and it might have happened, that no eldest son in Scotland was in possession of such an estate. But, possessed of an estate *in capite*, they could not have been excluded from parliament by any provision in that act. And if that act
does

* By the constitution of the parliament of Scotland, none but crown vassals had, or yet have a share in the representation, except in the shire of Sutherland alone.

does not disqualify them, there is no other statute of the parliament of Scotland whatever, which refers to them in any degree with regard to their disqualification, either directly or indirectly.

It is not a little to the present purpose to observe, that in a very minute account of the parliament of Scotland, and its different form from that of England, given by bishop Burnet, the very year when the act here referred to was dated, in the History of his own Times, * the incapacity of the eldest sons of peers to elect, or to be elected to parliament, is not so much as mentioned either expressly or by implication.

Considerable weight has lately been laid upon the circumstance of the shire of Kinross not being represented in parliament, when entirely the property of the Lords

G 2

Morton

* Vol. I. p. 185, anno 1661.

Morton and Bursleigh;† and it is alledged, that had their eldest sons been eligible, they would have then been sent as commissioners to parliament. But, if any weight should be thought due to that incident, may it not be asked, had these two noble lords no second sons? Had neither of them any friend whom they might gratify by raising him to a station of honourable distinction? Was it, that both these noblemen were without second sons, and without friends, that their property remained unrepresented in parliament for a considerable space of time? For so long the shire of Kinross was entirely in their possession. The truth is, that at that period, a seat in parliament was not an object of ardent ambition. Fictitious and confidential voters were then unknown. The two lords who were the sole proprietors of the county of Kinross, and who sat in the same assembly with the commissioners

† Sir John Sinclair, p. 43.—Mr. Wight, p. 216, and p. 468.

missioners of shires, did not consider an additional vote as a matter of any great consequence; nor would the eldest sons of the great barons, at that time, have considered the parliamentary representation of the lesser barons and burgesses, as any considerable addition either to their honour or importance.

The great barons then possessed a pre-eminence in those assemblies; that mutual jealousy above-mentioned was in full force; and the reign of Charles II. surely was not the period of popular influence in parliament.

The Earl of Morton disposed of his property in the shire of Kinross, to Sir William Bruce of Balcaskie, in 1681. Had his lordship retained possession of that property but a few years longer, until the *Revolution*, when a seat in parliament came for a short period, to be more eagerly fought

fought after, it is probable that an attempt would have been made to introduce his son as a member of that assembly; and a regulation, in all probability, would have been established in the shire of Kinross, similar to that which takes place in the county of Sutherland, “ which was held “ *in capite* entirely by the Earl of Sutherland, whose vassals were permitted to “ send representatives to parliament.”*

Mr. Wight observes, “ That Sir William Bruce, on his purchase from Lord Morton, thought it requisite to apply “ to the king, before he took upon him “ to represent the county of Kinross in “ parliament.”† The length of time, however, during which that county remained

* See 16 Geo. II. c. 11, where the former practice of that county is confirmed.

† Wight on Elections, p. 210—See also his Appendix, No. XXXIII.

mained unrepresented among the lesser barons, * probably gave occasion to the application made by Sir William Bruce; nor could he, perhaps, with propriety, have assumed his seat without making that application, on account of that length of time. In England, the borough of Barnstaple having neglected to send its representatives to parliament down to the reign of Edward III. then claimed, and was invested in its antient privileges which it had enjoyed before the conquest. Agmondesham, Windsor, and Great Marlow, in like manner, after an interruption of four hundred years, claimed, and were found by the commons

* The Earl of Morton, and the Lord Burleigh, being themselves noblemen, did in parliament represent their own lands. Minute of parliament, 18th of August, 1681. *Quer.*—Would that inference be applicable to their eldest sons? Would they as *noblemen* have represented their own lands in parliament; or were they in those days incapable of holding landed property distinct from their fathers?

commons and by the king to be parliamentary boroughs by prescription.†

It cannot, and it is not alledged, that the ineligibility to parliament of the eldest sons of peers in Scotland rests on any disqualification by *statute*. The only foundation on which it depends, is, two, and but two *resolutions* of the Scottish parliament: and these we now proceed to examine.

Of both these resolutions it may be observed, that they passed in times when the exclusion of the eldest sons of peers from all share in parliamentary representation in Scotland may be clearly traced to causes, very different from any which can be connected with the constitution of her parliament, or founded on feudal principles. The resolution

† Brown Willis. Lyttleton's History of Henry II. vol. iii. p. 389. Dr. G. Stuart, p. 326.

solution * of the 23d of April, 1685, by
 which Lord Tarbat's son vacated his seat,
 on the preferment of his father to that
 title, passed in the reign of James II. a
 period of oppression too well known.---
 Among the articles of grievances present-
 ed, in consequence of their declaration and
 claim, or bill of rights, by the Scottish par-
 liament at the Revolution, there is one,
 the eleventh, setting forth, " That most of
 " the laws enacted in the parliament of
 " 1685 are impious and intolerable grievan-
 ces." † Nor is it wholly unreasonable to
 suppose, that the disqualification of the
 master of Tarbat to continue to represent
 the shire of Ross after his father, who was

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high

* That resolution is as follows---*Edin. 23d April, 1685.*

" In respect the Viscount of Tarbat's eldest son was elected
 " one of the commissioners for the shire of Ross, by rea-
 " son that his father is nobilitate, cannot now represent
 " that shire as one of their commissioners; warrant was
 " given to the freeholders of that shire to meet and elect
 " another person in his place."

† Acts of parliament 1689, c. 18.

high in administration, (and whose political conduct, particularly his subservient acquiescence in the views of the crown, is well known) * was raised to the peerage, first under the title of the Viscount Tarbat, and afterwards that of the Earl of Cromarty, may have been obtained by ministry, and carried through in parliament, from other motives than the merits of the question. It was the first instance of the kind that had occurred; and it was easier to obtain a precedent in one of their own friends vacating his seat, than in a question on a contested election, or when an instance, as in England, might occur in succession.

It is of great importance, on the present subject, to observe, that the chief barrier which was opposed in Scotland to the des-
 potic

* Sir George Mackenzie was at that period Lord Clerk Register; he had before been Lord Advocate of Scotland; both offices then of great trust.

potic principles of the reign of James II. consisted in the influence of the great barons. In order to crush, or at least to prevent the increase of this influence in the proceedings of parliament, the very first opportunity was to be embraced, of establishing a precedent that might exclude the eldest sons from the right of sitting and voting in that assembly. That which arose on the creation of Lord Tarbat, was the most fortunate for their views that could be well imagined, and it was not neglected. For, although the right of sitting by representation in parliament was not considered, at that period, to be of any great moment in Scotland, and the lesser barons in general, and the people, had not then attained much weight; yet the importance to which the commons and the parliament of England had risen in the reign of Charles I. was too fresh in the recollection of his son, not to sway and direct his measures of government.

With regard to the other resolution of the Scottish parliament respecting the exclusion of the eldest sons of peers, it was passed on the 18th of March, 1689, * immediately after the Revolution, when that fortunate event, and the growing connection with England had of a sudden infused throughout Scotland high notions of independence and liberty, and the whole island for the time glowed with the genuine enthusiasm of freedom. It has already been hint-

Edin. 18th March, 1689. " The meeting of estates
" having heard the report of the committee for elections,
" bearing, that in the controverted election for the burgh
" of Linlithgow in favour of the Lord Livingstone and
" William Higgins, it is the opinion of the committee,
" that William Higgins's commission ought to be pre-
" ferred: First, in regard of Lord Livingstone's incapa-
" city to represent a burgh, being the eldest son of a peer.
" Secondly, in respect that William Higgins was more
" legally and formally elected by the plurality of votes of
" the burgeses. They have approven and approve the
" said report in both heads thereof, and interpone their
" authority thereto."

ed, that the limitation of voting at elections by the act of 1681, to those "possessing and "publicly interested in the superiority of land "liable in payment of public burthens to "the extent of 400l. of valued rent,"* had produced the effect of creating in the kingdom a second aristocratical party, equally inauspicious to freedom and general liberty. The vote of 1689 was passed at a time when this party, who had but too sensibly felt the political influence of the great barons, took advantage of the general enthusiasm of that period; and about the time of the suppression of the Lords of the Articles, who had been considered as one of the greatest grievances † under which the

* See Appendix, No. IV.

† The Lords of the Articles were a committee of parliament elected from the different estates, under pretence of easing the weight of the business. They were to prepare



the nation had suffered. That committee of parliament formed the first complaint in the articles above-mentioned, given in by parliament in 1689, and was abolished by 1690, c. 3.

Thus, a principle of government, contrary to what had directed the resolution of the 23d of April, 1685, but equally tending to reduce the influence of the nobility or great barons, operated in that of 18th March, 1689. But, in neither of these resolutions do the merits of the case appear to have been investigated.

The
pare those motions and overtures which were to be presented to parliament; and it came at length to be understood, as in the statute of POYNINGS respecting Ireland, that no motion could be introduced into parliament, or be debated in that assembly, unless its introduction had been previously approved of by the Committee of the Articles; by which means that committee, whose election was almost intirely in the power of the crown, possessed a negative before debate on the proceedings of parliament, and no motions could be introduced but such as were agreeable to their views. †

† See Burnet's Hist. of his own Times, vol. I.

The committee of the Scottish parliament for determining controverted elections, was necessarily composed of the commissioners for shires and burghs. Those who sat in parliament in person, in all probability made no part of that committee; and, had the nobility been disposed to have contested the *principle*, they were effectually prevented by the *second* point of disqualification in the resolution just mentioned. "In respect, William Higgins
 " was more legally and formally elected
 " by the *plurality* of votes of the bur-
 " gesses."

It may be asked why no attempt was made in Scotland, after 1689, to bring this point of disqualification to an issue.

The glow of freedom which prevailed in Scotland about this time, was but of short duration. A temporary enthusiasm
 for

for liberty soon yielded to the natural operation of her political constitution. The distance of the sovereign, the over-bearing influence of aristocracy, the total want of connection between the people at large and parliament, the commercial sacrifice that was made of Scotland in the affair of Darien,* and the despotic tendency of the heritable jurisdictions,

* The commercial spirit which began to appear in Scotland since her connection with England, while a separate kingdom, but under the same sovereign, towards the end of the last century, induced the people of Scotland to attempt the establishment of an extensive commercial colony on the Isthmus of Darien, in America. This company was called the African, or Indian Company; in which the wealth of the country was deeply engaged. That attempt, after the nation had been at an enormous expence, the commercial jealousy of England, and the remonstrances of Spain, rendered abortive. The colony was abandoned, and the failure of the undertaking was a national calamity. The commercial spirit sunk; the people again fell back into their accustomed subjection, apathy, and indolence; nor did they in any degree emerge from these, until the abolition of the heritable jurisdictions.

jurisdictions, instead of cherishing those latent principles of liberty which are so congenial to human nature, chilled their warmth, and checked their rising growth.*

The great proprietors regained their influence, nor did their sons continue to look upon a seat in parliament as any mighty object of ambition. The crown also resumed

* The two last articles in the list of grievances, presented by the parliament of Scotland at the Revolution, were, " That all grievances relating to the manner and measure of the lieldges, their representation in parliament, be considered and redressed in the first parliament."

" That the grievances of the burghs be considered and redressed in the parliament."

No such redress, however, took place; for, with the single exception of the additional representation given to the larger shires, by 1690, c. 11, the act 1681, c. 21, remained the chief regulating act of county elections, until 16 of Geo. II. c. 11. The grievances of the burghs have not even yet been taken into consideration, and are now before parliament.

sumed its sway, and its jealousy of the great barons. And, had not the nation been happily saved by the Union, Scotland, in all probability, would have relapsed into the languor of tyranny. That treaty, with the measures which were afterwards adopted by government, emancipated the people from the servile dependence, in which they had been kept by the pride and the policy of the landed proprietors, long after the spirit of the feudal system had been extinguished. Nor was that aristocratic influence enjoyed only by the nobility. In every great alteration of the political system of a country, there are some upon whom the change will bear harder than on the rest. The introduction of personal titles of peerage, with an hereditary seat in parliament, and of representation, by 1587, c. 114, left, as has been already observed, a number of aristocratical chiefs, upon whom the sovereign

reign had not conferred the dignity of peerage. They were deprived of their right of sitting *personally* in parliament, which they had before enjoyed. They still, however, retained their weight as *great proprietors*. Nor was the disqualification here complained of extended to their sons.

The prospect of an union with England, however, and of an incorporation of the parliaments of both nations, produced in Scotland a great alteration in the opinion that was entertained of the importance of parliamentary attendance. The commons in the parliament of England had long enjoyed a very considerable share of political power and consequence. And, on the incorporation of the parliaments, a seat in the national assembly became a matter of respect, and an honourable distinction throughout Scotland. It was therefore to be expected, that an anxiety on that subject

would arise, and a jealousy be displayed of the *extension* of that privilege. Accordingly, when the mode of electing the representatives from shires and burghs, allowed in the treaty of Union to Scotland in the parliament of Great Britain, was debated in that of Scotland, 27th January, 1707,* it

* De Foe, in his *Treaty of the Union*, p. 212, observes, “ That the motion against the eldest sons of peers
 “ had not a little to be said for it, particularly, that
 “ when the influence of the nobility in Scotland comes
 “ to be considered, with the small number of members
 “ to be chosen, it might in time come to rise to what was
 “ hinted before, in that project of reducing the lords
 “ that did not sit in the House of Peers, to a level with
 “ the commons; that then it might come to pass, that
 “ Scotland should be represented only by her nobility,
 “ and that there should be Scotch lords in the parliament of Great Britain. So here in time it might happen, that the nobility in the House of Peers, and their
 “ eldest sons in the House of Commons, might make up
 “ the whole of the representatives of Scotland.

“ There were a great many arguments brought against
 “ this proposal, but these seemed the most prevailing,
 viz.

it was proposed to have expressly disqualified both the *peers* and their eldest sons, (who *now* also began to entertain far different ideas of the importance of parliamentary attendance by representation,) from enjoying any share in that representation; nor was a share in that representation to be extended to the *people*. It is not however apparent, why the *peers* were included in that motion, who certainly, unless *then* expressly granted to them, could not have had any share in the representation

“ viz. 1st, That it had been always allowed in Scotland before, viz. that the eldest sons of peers might be elected.
 “ 2d, That the eldest sons of peers do sit in England in the House of Commons; and it would break in upon the rule of equalities to alter it, and put the Scotch gentlemen in a worse condition than the English.

“ After some time, a vote was offered that put it to an end, viz. to let the right of being elected remain just as it was, without any alteration at all; that he that had a right or capacity to vote, or to be chosen before, should have so still; and this ended the debate.”

presentation of the commons, in consequence of the act, 1661, c. 35, above-mentioned. And with regard to their eldest sons, had the provision of that act of parliament, excepting from the right of voting at elections all *noblemen* and their vassals, been sufficiently expressive, as now alledged, that motion would have also been equally unnecessary to have excluded their *sons*.

Although by the treaty of Union, the peers were to sit in future only by representation from their own order, that representation was to be regulated by conditions and obligations distinct from those that took place in that of the commons. In this, a property held of the crown was necessary to constitute the privilege of the elector. But the whole order of the peerage of Scotland were, in virtue of that treaty, to possess, independently of property,

perty, the right of representation in the House of Lords, and every privilege of peers of Great Britain, the only excepted, of an hereditary seat in parliament. And, in addition to this reasoning, it has already been shewn, that the two disqualifying resolutions of 1685 and 1689, were not decisive of the point to which they referred, but founded solely in the views of party. Though it is admitted that these, at the period when they were adopted, may have been attended with effects which were convenient and salutary to the political state of the country, it will as readily be allowed, that they were passed, on principles which, now that the civil constitution of Scotland ought, by means of the union with England, to have recovered its original spirit of equality and regard to the rights of mankind, cannot be consistently maintained by a British parliament.

On

On the motion in the parliament in Scotland, " That no peer, or the eldest son of
 " any peer, can be chosen to represent
 " either shire or burgh of this part of the
 " united kingdom (Scotland) in the House
 " of Commons of Great Britain," there
 voted for that motion, of the nobility, two;
 of the barons and commissioners of shires,
 forty-seven; and of the burgessees, twenty-
 three: in all, seventy-two. That motion
 being negatived, a second was proposed,
 in these words: " That none shall elect,
 " nor be elected to represent a shire or
 " burgh in the parliament of Great Bri-
 " tain, from this part of the united king-
 " dom (Scotland), except such as are now
 " capable, by the laws of this kingdom,
 " to elect, or be elected as commissioners
 " for shire or burgh to the said parlia-
 " ment." For this motion there voted,
 of the nobility, sixty-one; of the barons,
 five;

five; and of the burgesſes, twenty: in all, eighty-fix. *

From the reſult of theſe two motions, it appears reaſonable to preſume, that, had the diſqualiſication of the eldeſt ſons to repreſent the ſhires and burghs of Scotland been a point clearly eſtabliſhed, the firſt had probably been carried. There voted, on both motions, of the commiſſioners, ninety-five; and of the nobility, only ſixty-three.† Why, therefore, apply that clauſe of the act of parliament, 5 Ann. c. 8,

“ That none ſhall be capable to elect, or
 “ be elected, to repreſent ſhire or burgh in
 “ the parliament of Great Britain, for this
 “ part of the united kingdom (Scotland),

K “ except

* See Appendix, No. V.

† Of theſe 63, *two* were commoners, who, in right of their *offices*, voted among the *nobility*; the Register, Sir James Murray, of Philliphaugh, Knight, and the Juſtice Clerk, Adam Cockburn, of Ormiſtoun, Eſq.

“ except such as are now capable to elect
 “ or to be elected as commissioners for
 “ shires and burghs to the parliament of
 “ Scotland : ” --- Why, I say, apply this
 clause exclusively to the eldest sons of Scotch
 peers, when their disqualification, being
 directly moved in parliament on occasion
 of the *Union*, was negatived by a consi-
 derable majority ?

The provision of that clause will extend
 to many others to whom it has not been
 applied. It confirms the existing acts of
 the Scottish legislature respecting the repre-
 sentation of shires and burghs in parlia-
 ment. It corroborates the provisions of
 1427, c. 101 --- of 1587, c. 114 --- of 1661,
 c. 35 --- and of 1681, c. 21, &c. and it
 thereby provides, that the voters in the
 shires of Scotland must still possess, and
 be publicly infest in the superiority of a
 forty-shilling land of old extent, or 400l.
 of

of valued rent. The High Treasurer, the Treasurer-depute, the Secretary, the Privy-Seal, the Master of Requests, the Clerk Register, the Justice Clerk, and the Lord Advocate, when commoners, sat in the parliament of Scotland, in virtue of their offices; and it was understood that they neither could elect nor be elected: for, “ The Justice Clerk and the King’s Advocate having voted at an election for “ the county of Mid-Lothian, in 1675, “ Lord Fountain-hall observes,* that they “ should not have voted, because, being officers of state, and as such possessing a “ seat in parliament, they were not capable “ to be elected: and to elect and be elected, “ *sunt correlata quorum uno sublato, tollitur et alterum.* † It was left unprovided by the treaty of Union, whether the King’s Advocate, in virtue of his office, should sit in the parliament of Great Britain, or

K 2 no.

* Vol. i. p. 352.

† See Wight on Elections, p. 66.

no. His right of sitting in that capacity has not been established, nor has the provision of 5 Ann. c. 8, although applicable, been extended, either in bar of his eligibility from Scotland, or of his privilege of voting at elections: on the contrary, the Lord Advocate has, since the Union, been almost constantly a representative in parliament from Scotland; and, with regard to his exercise of the right of voting at elections, it has been uniform and unvaried. The other great officers of state who still exist in Scotland, the Privy-Seal and Clerk Register, are precisely in the same situation. The office of Privy-Seal has been held by the Right Hon. James Stuart Mackenzie for many years, in the course of which he represented Ross-shire until the general election in 1780; and that of Clerk Register, by Lord Frederick Campbell, who now represents in parliament the county of Argyle. The Justice Clerk,
since

since the Union, is disqualified by statute from sitting in parliament, because he is a judge; but he may still vote at elections.*

In the parliament of Scotland, no person could represent a burgh who was not a burghers of it.† And several instances of disqualification occur upon that ground. But, since the Union, that qualification has been dispensed with. In 1774, Mr. Dashwood was found capable of representing the district of the burghs of Wigton, Whitehorn, New Galloway, and Stranraer, although he was not a burghers of either the one or the other.‡

The obvious reason with the parliament of Scotland for disqualifying the eldest sons of

* 7 Geo. II. c. 16.

† Letter from king Charles II. to the convention of royal burghs 1674, and act of convention in consequence, in July 1675.

‡ Mr. Wight on Elections, p. 401, 2, 3, 4.

of her peers was, the power of their families: and a similar jealousy had also taken root against them in England; for, on the same ground of political expedience, not of justice, their disqualification was confirmed in 1708 by the House of Commons.* But if political expedience be removed, together with the danger to be apprehended from the cause on which it was founded, the disqualification in question falls to the ground, being unsupported by any plea either of justice or of political necessity. And, if all this be so, ought not the eldest sons of the peers of Scotland to be restored to their rights of election? Ought not the candour of the British nation to be displayed, and her justice to be extended and established?

At the Union, the parliament of Scotland consisted of 153 peers, † 90 commissioners

* Scot's Hist. of Scotland. Tindall's Rapin, ann. 1708, &c.

† Of those 153 titles of peerage, about eighty have now
either

sioners from shires, * and 67 from burghs. Of the peers many were of English families, who had obtained titles of honour without being in possession of property in Scotland, or ever wishing to assume their seats in the Scottish parliament. So that, allowing a reasonable proportion for peerages vested, at the time, in minors, females, or other disqualifying situations, it is probable, that the number of parliamentary commissioners from the shires and boroughs, who might attend, and which jointly amounted to 157, would often, during the investigation of that treaty in particular, have exceeded the number of peers

either demised or merged in other titles, either of Scotland or of Great Britain.

* See Wight, p. 75. Acts of parliament 1690, c. 11.

“ This statute increased the number of the representatives
 “ of shires from 64 to 90. The number of the representatives of boroughs was then 66, viz. two from Edinburgh, and one from every other borough. The borough of Campbeltown had not then been erected.”

peers that might have been present in parliament.* This being the case, it is not a matter of wonder, if the interests of the peerage and of their sons were at times neglected, or sacrificed to a jealousy of their power, in an assembly where the votes of the peers made part only of the collective whole.

In the point in question, however, it was not the nobility of Scotland who contend-
ed

* By an act passed in the parliament 1641, the right of sitting in that assembly was denied to peers who possessed not 10,000 merks (above 500l. sterling) of annual rent in land within Scotland, at the time of their creation. Hume's Hist. of England, vol. vi. p. 353, 4. The parliament of Scotland, however, on the Restoration, rescinded, without distinction, all the acts which had been passed during the Usurpation, and since the parliament held in 1633, by 1661, c. 15. Those English families who had obtained Scottish titles of honour, like the present peers of Ireland, might in future have claimed their seats, previously to the Union, in the parliament of Scotland, and still vote at the elections of the *sixteen*.

ed with the people: it was one aristocratical body contending with another. The commissioners from the burghs were, on the two motions, almost equally divided; and, with regard to the people, and small landed proprietors in the shires: these were, at that time, as little regarded by parliament as the aristocracy itself could desire, being cut off from all share in the representation of the counties by the act of 1681, as already mentioned.

It has been observed, in the course of treating this subject, that various and contrary sentiments had been adopted by the Scotch, in a short space of time, with respect to the importance of parliamentary attendance. Let those, to whom those frequent alterations in opinion may appear extraordinary, recollect, that that nation had uniformly been quickly fired, and inured to sudden resistance: that the

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power .

power of the parliament of Scotland was originally very extensive, although that power was possessed by an aristocracy only : that the sovereigns had attempted to check this influence : that various antient records of the kingdom have been lost, or if in existence, been carried off into England: that the edition of the acts of parliament published in the reign of James VI. is *mutilated*, and deprived of almost every sentence that made for the *power* of parliament, which a comparison between it and the manuscript copy in the Advocates library at Edinburgh, or the edition published in the reign of queen Mary, called the Black Acts, from being printed in the *Saxon* letter, will sufficiently evince : that this mutilation of the statute book seems to have sprung from those arbitrary notions of government which that prince entertained, and which at length destroyed that of his family : and that, violently as the
island

island of Britain resisted Charles the First, in *twelve* years after that unfortunate monarch had laid his head on the block, both nations of which that island consists, received back his son, with more extensive powers than they had disputed with the father.

The enthusiasm in favour of monarchy that prevailed at the period of the Restoration, is apparent in the preambles to the acts of the parliament of Scotland. They breathe almost an avowal of *indefeasible and divine right*. Sir Archibald Primrose, who, as Clerk Register of parliament, had the management of drawing up those preambles, says bishop Burnet,* told him, that he verily believed he was bewitched on that occasion; and that he then thought, he could not express in *them* too much adulation

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and

* History of his own Times.

and satisfaction, at the happy event of the Restoration. Let it also be recollected, that the nation, although passive during the reign of Charles II. could not continue their forbearance in that of his brother James, and the Scotch, always enthusiastic where interested, led the *van* at the Revolution.

The people of Scotland had, at that time, been spirited up by *both* the aristocratic bodies of which her parliament then consisted. But, the Revolution being once accomplished, it was not the interest of either aristocracy to follow it out with a parliamentary redress for the people. They would not have complained without *distinction* of the jurisdiction given by 1681, c. 18,* to the crown within the

* The act 1681, c. 18, not only confirmed the right of the crown to a cumulative jurisdiction within regalities and

the districts of regalities and baronies, had they at that period been desirous of such redress. At the Union also, the shew of interest then displayed in the importance of parliamentary attendance, was confined to those aristocratic bodies. A treatise published in 1703, on the ancient power of the parliament of Scotland, attempted in vain to revive the rights of the people. The reservation of the *heritable* jurisdictions evinced its inefficacy. Nor does the unwillingness to extend the right of voting in Scotland, which still exists, argue as yet an alteration of those sentiments. But the nations are now united, and let the parliament of Britain diffuse the spirit and intention of her happy constitution universally over the island.

While and baronies, but also renewed to the king the privilege of judging causes in *person*. It was however the *cumulative* jurisdiction which parliament complained of at the Revolution. See Appendix, No. III.

While the exclusion of the eldest sons of the peers of Scotland, though it derived its origin from the designs of the court, and was continued in the spirit of *party*, was covered and protected by the plausible pretext of equality, and the balance of the constitution : to have expected a repeal of those resolutions by which that exclusion was established, by the force of any appeal to public justice and candour, would certainly have been vain, and might also have been deemed improper. But times change, and new expedients are adopted in new situations. The circumstances which render a measure or arrangement proper at one time, being changed, that measure or arrangement may become not only useless, but inconvenient and even detrimental : in the same manner that men are wont to throw open their doors and windows in summer, but to shut them in winter ; and as the skilful mariner contracts or crouds his sail according

according to the varying gale or breeze. It has been stated above, that the justice of disqualifying the eldest sons of peers from electing, or being elected to parliament, was never made a subject of discussion. The ground of its justice or injustice is, therefore, yet entire: and it is on this ground alone, namely, that of political expediency, by a change of circumstances being perfectly removed, that it ought in candour and fairness to be now considered.

But, on this leading point, it may be necessary, and cannot be improper, to insist further. Lord Johnstone, son of the Marquis of Annandale, was returned to the first parliament of Great Britain in 1708, from the burgh of Linlithgow; and Lord Haddo from the county of Aberdeen. A petition was given in, in the name of Sir Alexander Irvin of Drum, and the other freeholders of that county, against the return

turn in favour of Lord Haddo; and
 counsel having been heard at the bar of
 the House of Commons, on the part of
 the petitioners only, (for the others did
 not reply) a motion was made, " That
 " the eldest sons of the peers of Scotland
 " were capable by the laws of Scotland,
 " at the time of the Union, to elect, or
 " be elected as commissioners for shires or
 " burghs to the parliament of Scotland,
 " and therefore, by the treaty of Union,
 " are capable to elect, or be elected to re-
 " present any shire or burgh in Scotland,
 " to sit in the House of Commons of
 " Great Britain." This motion passed in
 the negative; and next day, being the 4th
 day of December, 1708, new writs were
 ordered for electing other commissioners in
 their room.* No subsequent attempts have
 been made to ascertain their right. Several
 instances indeed occur, of new writs being
 issued

* See Journals of the House of Commons, *tertio die
 Decembris, septimo Annæ reginæ.*

issued out upon the event of members having become eldest sons of peers of Scotland; but all of them, as in the late case of Lord Elcho, in 1787, unaccompanied with an investigation of the merits of the cause, and proceeding entirely upon the authority of the standing order of the house just mentioned.

A fair opportunity was indeed offered of entering fully into the question of disqualification, on the rejection of the Lords Johnstone and Haddo. But no arguments were offered on the part of these lords, in answer to the counsel for the freeholders, " because their fathers, and the peers of Scotland in general, would not so much as admit a doubt of their eligibility, as the eldest sons of the peers of England enjoyed a like privilege in that country."*

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* See Scott's History of Scotland, p. 746.

The counsel on the part of the freeholders rested their argument on the danger that might accrue to the independence of the House of Commons, from the influence of the nobility, and insisted, that, were the precedent in question once admitted, the representation of Scotland would be entirely in the hands of that order. But, in whatever degree that influence may have been detrimental to the liberty of the Scottish parliament, there is little danger to be apprehended from it to the cause of freedom at this day, when, in consequence of the Union, the parliamentary representatives of Scotland have been incorporated into a distinct and numerous assembly, when the commons have, in that country, at least recovered their proportion in the scale of government, which even an inaccurate review of the present state of her shires and burghs, and of their representatives to parliament, will

will sufficient lyevince to be the case ; and when, let it be remarked, the commissioners of the shires are chosen by the freeholders of the county, and those of the burghs by the leet (list) of the burghs.

If, however, a peer of Scotland shall still retain such influence in a county or burgh, as to carry the election in favour of his friend, whether is it more derogatory to the honour, or dangerous to the independency of parliament, that he should move his interest, in order to procure the election of his eldest son, or that of his youngest son, or any of his confidential friends ? Is political influence in that country more dangerous in the possession of a peer of Scotland, than in the hands of a commoner of overgrown fortune ? Or of a peer of Great Britain ? Or of an Irish peer ? Without entering into the justice or injustice of the *resolutions*, not *formal*

and deliberate acts, excluding the eldest sons of Scotch peers from parliament, and confining our views merely to its practical consequences, has their disqualification, in fact, prevented the interference of the Scottish nobility, or of other great proprietors, in matters of election? Or can it be supposed that the removal of their disqualification would materially increase that interference? There is no man acquainted with the state of Scotland, by whom such an idea can be entertained. And in whatever situation their eldest sons may be supposed to have stood, while the peers sat in the same meeting with the commons, and formed but one collective body, that situation, since the Union, is completely altered. At a period when Scotland laboured under the tyranny of hereditary jurisdiction, when the weight of the great barons bore down the rights of the commons, it may have been necessary to controul the
towering

towering height of their power, perhaps, by the disqualification of their *eldest sons*. But when that power is no longer dangerous to freedom; when no necessity of reducing it further exists; when the commons have recovered their equality: let the effect cease with the cause, and every odious distinction be removed; let the *corruption* of elections in Scotland be destroyed, the influence which arises from property independent of character be removed, and nominal and fictitious voters be annihilated, if that nation shall desire it; but do not deprive those, whatever their rank or situation in life may be, who possess extensive property, of that influence so grateful to the human mind, which they *only* enjoy as men.

Had the same arbitrary constitution in elections been established in England which prevailed in Scotland, disqualifications

fications might have been adopted in the former country similar to what took place in the latter. But the democratical spirit which had made its way into England so much earlier than in Scotland, commercial habits and industry of every kind, and the consequent security and independence of the people, rendered all such disqualifications unnecessary. A very different order of affairs took place in Scotland, where the lesser proprietors were harrassed by their more powerful neighbours. Every baron possessed his castle and his jurisdiction. He considered himself as entitled to redress the injuries that were done to him by force of arms, and as the feudal lord and master of his people, who were not only bound to submit to his authority in civil matters, but to support that authority in all cases, by military attendance.*

It

* Military service was the foundation of the feudal system. That service, which the sovereign required in the national

It was not until the abolition of the *hereditary* jurisdictions* in 1748, that the people
of

national militia, was parcelled out to each chief in proportion to his property—he led his vassals to the feudal army, and he required their assistance in his own quarrels—the feudal system was in regular gradation—those duties which the sovereign demanded of the vassals of the crown, they again demanded of their own. Happily the right in the individual, to require that service, has ceased; yet the claim to a *national* militia still exists. In Scotland, that constitutional system of national defence subsisted at the Union. The parliament of Britain in 1709 voted, “ that her militia should be regulated as in England,” which mode of internal defence, parliament has also declared 30 Geo. II. c. 25, “ to be essentially necessary to the safety, peace, and prosperity of England.” Those unfortunate but political causes, through the operation of which Scotland was afterwards *disarmed*, are now at an end. Disaffection has been extinguished, and “ the spirit of Jacobitism has retired to seek repose in the grave.” No part of the British dominions feels *now* stronger attachment to the House of Hanover, and to the constitution, than that country. Yet her claim to a *militia* has not been established, and her system of home defence, by means of *fencible regiments*, in time of war, (for in peace she has none) is far less constitutional.

* 20 Geo. II. c. 43. Although it may be admitted that the *nobility* saw with satisfaction the general advantage to the country

of Scotland were emancipated from aristocratical tyranny, or that the genial effects of

country in that measure, which was undoubtedly a proper amendment of the treaty of *Union*, the author by no means intends to say, that the *peers* of Scotland had participated in *all* the advantages arising from that treaty. Their patriotic sacrifice at that period was but ill requited. To accelerate the accomplishment of the *Union*, they threw themselves upon the future determination of the administration and parliament of Britain; and they have become a *solecism* in the British constitution, an hereditary order, sitting, by a small representation, in an hereditary assembly and *inelective* estate of parliament. Nor is that representation for *life*, but chosen into each parliament.

Had they, at the *Union*, demanded the right of election into the House of Commons, while a *certain* number of their families had been declared *hereditary* peers of Great Britain, and to be filled up as they fell *vacant*, from the peerage, since all could not obtain that situation, it is submitted, whether they would not now have stood in a much more flattering and respectable condition; and perhaps a *plan* somewhat similar might still be attended with success.

Had this proposal then taken place, it would, in the constitution of parliament, have been only a further restriction

of the Union with England were completely established.* At that auspicious æra, those barbarous chains which had checked industry, damped genius, and which were, in so many other respects, de-

striction and limitation in the obligation or right of *personal* attendance. Was the plan just mentioned to be now adopted, the rights of the collateral heirs of succession might be saved, by confining the British peerage to the *heirs-male* of the body of the persons holding those *titles* at the time they may be nominated; upon the demise of whose heirs-male, the Scottish peerage would again revive in the collateral succession, and be again entitled to the chance of nomination into the House of Peers. Was this rule adopted, it would follow, that those peers of Scotland, who *have* already obtained an *hereditary* seat in the House of Peers, would be removed from a competition in that *number*, while their *present* hereditary title existed; nor would the *prerogative* of the crown be restrained, in calling *others* of the peers of Scotland to the House of Peers, independent of the nomination above mentioned,

* On this subject of the Union, see farther CUNNINGHAM'S History of Great Britain, lately published, in which a very interesting account is given of the transactions of that period.

detrimental to the interests and even the morals * of the lower classes in Scotland, as well as dangerous to the state, were shaken off. The feudal baron, in exchange for what served only to feed his pride, became a partaker in all those advantages which naturally flow from that general industry and improvement, which accompany a spirit of rising freedom.--- Scotland, since that period, has improved rapidly, industry has increased, the public revenue has been greatly augmented, and ideas of constitutional liberty in general pervade the nation.

Had these changes taken place before the *Union* of the parliaments, and the peers of Scotland been separated, as in England, into a different house from that of the commons, the question concerning the

* The old custom of levying black mail, an annual value given to secure your property from pillage, originated in the abuse of feudal possessions.

the eligibility of their eldest sons might not have remained, at this day, a subject of discussion. It is said, that the first time the eldest sons of peers were known to sit in the House of Commons in England, was in 1550, during the reign of Edward VI. when Sir Francis Russel, who, by his brother's death, came to be presumptive heir to his father Lord Russel, created earl of Bedford, did not vacate his seat on that succession.* This case is nearly similar to the first instance which occurred in Scotland at a much later period, though it was differently and justly decided.

It was evident to the common sense of the English nation, that the eldest sons of peers, who did not sit in parliament in person, could not, on the introduction of re-

N 2 presentation,

* See Wight, p. 272; *Precedents of Proceedings in the House of Commons* by Mr. Hatfield, published in 1781, p. 10, 11, &c.

presentation, in their parliamentary capacity be annihilated; and it was fortunate that those principles of justice then prevailed, since they are thereby enabled to prepare, and to qualify themselves to act with honour and propriety in those situations which they are one day to fill. This class of citizens in England were not, as the same class was, at a later period in Scotland, objects of political jealousy and intrigue. The minority of Edward the Sixth prevented the interference of the crown; and the division of parliament into separate houses, had removed that jealousy which might otherwise have been entertained of the peers by the commons. The right of the eldest sons of peers to elect or be elected, in the character of English freeholders, was not supposed to be invalidated by the circumstances, that no instance of their attempting to obtain a seat in parliament, had occurred sooner than this which
has

has just been quoted. Although representation had been introduced in England, as early as the reign of Henry III. had it not been for the contingent event of succession, a considerable time might even have elapsed after this period, before the sons of her peers had been led to consider a seat in the House of Commons of that country, as an object of sufficient importance to merit their attention.

If then, on the whole, we reason from the natural rights of mankind, from the originally free and equal constitution of Scotland, from the circumstances which occasioned the exclusion that is the subject of these observations, from that change of circumstances which has taken place since, or from that which had so general and great an influence on the political constitution of Scotland in other instances: in a word, whether we reason from justice, political

litical expedience, or example, the claims of the eldest sons of the peers of Scotland to parliamentary representation will appear incontestible.

But it has been suggested, that in order to obtain the exercise of this right, an alteration must be made in the *articles* of the Union; and, in opposition to this, all the dangers have been displayed which the nation would have reason to apprehend from an infringement of that sacred treaty. To those who argue in this manner, without combating the general position, that it is the interest of Scotland to adhere strictly to the terms of the Union, (for that has been artfully blended with this subject) the question may be put, has the treaty of Union been invalidated by the abolition of the *heritable* jurisdictions? Or by different acts for regulating elections? Or by those altering

altering the penalties of many crimes, (particularly treason, 7 Ann. c. 20) which, in Scotland, were not punished in the same extent before the Union? Can it in reality be supposed, that the validity of this treaty may be endangered by the successful issue of that spirit of reform now prevailing in both the shires and burghs of Scotland? Would the main and essential articles of the Union, on which the incorporation of the kingdoms depends, be thereby unhinged? Why, then, fear any evil from admitting a capability in the eldest sons of the peers of Scotland to represent her shires and burghs in parliament? Again, would the national faith of England, *then* pledged to Scotland, be infringed? Would the establishment of the presbyterian form of church government be thereby affected? Or her participation in the commercial privileges of England? Or her proportion

portion of the land-tax, * even if her personal taxes and stamp duties should be equalized

* If Scotland has any thing to dread from an alteration of the articles of the Union, it is in the land-tax. There is no inducement to injure her in any of the rest ; for motives of national improvement will mutually dictate in each kingdom the encouragement of industry. And, with regard to that important article, Scotland is guarded by the national faith of England ; since it was with that article that she compounded the *number* of her representatives in parliament, but not the *manner* in which they were to be sent. For, admit the latter, and you destroy the proposed alteration in her laws of county elections, now universally declared necessary. The provision in the treaty of Union, on that head, is distinct and absolute. By article 9th, it is provided, “ That while England pays a sum, somewhat under two millions sterling, annually, of land-tax, Scotland shall pay “ forty-eight thousand pounds sterling, as such.” That is, while England pays four shillings in the pound, Scotland shall pay an eight month’s cess. Now, while England shall continue to pay that sum annually, Scotland will be assessed in that proportion ; and if England shall pay but two shillings, or three shillings in the pound, Scotland will then pay only a four month’s cess, or twenty-four thousand pounds, or a six month’s cess, being thirty-six thousand pounds. If England, again, shall pay six, or
more

equalized throughout Great Britain? No! No such alarming consequences can seriously be apprehended from the innovation in question; if, indeed, to restore a body of men, respectable for their birth, their character, their possessions, and their prospects, to the exercise of a right of which they have been injuriously deprived, can be properly called by so invidious a term. In whatever degree the Scotch may be tenacious of the Union articles; it is absurd to suppose, that the removal of this disqualification of the eldest sons of the peers of Scotland, can be in any degree construed into an infringement of that treaty; nor of the subsequent act, 5 Annæ, c. 8,

O above

more shillings in the pound, Scotland will in like manner pay a twelve-month's cess, or more, and so on. But Scotland cannot be affected with any new internal regulations respecting that tax within England. It is the general sum that she has to regard, and it is in the annual alterations of that general sum alone, that she can in any measure be affected.

above mentioned, which is declared to be of equal validity with the articles of *Union*.

From that never-ceasing fluctuation which constantly diversifies the face of human affairs, it will always be a true maxim, that there are more cases than laws. Not only have men of speculation found it impossible to frame a model of government equally adapted to all mankind, but the laws of the same nations necessarily change with their changing characters and circumstances. Were no alterations practicable in the treaty of *Union*, it would, in time, become a confused and unwieldy mass, and fall to pieces from its inconsistency. Yet any alteration is only to be made with *general* consent.

If no such thing as a possibility of alteration in the constitutional system of Scotland was foreseen and supposed at the *Union*, where was the sense and meaning of the 4th,

the

the 18th, and the 25th articles of that treaty? The truth is, by the Union, the government of Scotland was to sink into that of England. The two kingdoms were to be inseparable, and for ever joined. The principles of that constitution which had deviated least from its original basis, and which was most congenial to the rights of mankind, were to be the leading features in the British government. And, it cannot be supposed, that by a treaty framed after such a model, the first rights of that constitution were to be refused to the eldest sons alone of the peers of Scotland.

It is provided by the 4th article of the treaty of Union, “ That all the subjects
 “ of the united kingdoms of Great Britain
 “ shall, from and after the Union, have
 “ full freedom and intercourse of trade
 “ and navigation, to and from any part

“ or place within the said united king-
 “ dom, and the dominions and planta-
 “ tions thereunto belonging; and that
 “ there be a communication of all *rights,*
 “ *privileges, and advantages,* which do or
 “ may belong to the subjects of either
 “ kingdom, except where it is otherwise
 “ expressly agreed in these articles.”

By the 18th article, “ That the laws
 “ concerning the regulation of trade, cus-
 “ toms and excise, to which Scotland, by
 “ virtue of this treaty, is to be liable, shall
 “ be the same in Scotland, from and after
 “ the Union, as in England; and that *all*
 “ *other laws* in use within the kingdom of
 “ Scotland, do after the Union, and not-
 “ withstanding thereof, remain in the same
 “ force as before, (except such as are con-
 “ trary to, or inconsistent with this treaty)
 “ but *alterable* by the parliament of Great
 “ Britain, with this difference betwixt
 “ the

“ the laws concerning public right, poli-
“ cy, and civil government, and those
“ which concern private right; that the
“ laws which concern *public right, policy,*
“ *and civil government*, may be made the
“ same throughout the whole united king-
“ dom, but that no alteration be made in
“ laws which concern private right, *ex-*
“ *cept for evident utility of the subjects within*
“ *Scotland.*”

And, by article 25th, “ That all laws
“ and statutes in either kingdom, so far
“ as they are contrary to, or inconsistent
“ with the terms of these articles, or any
“ of them, shall, from and after the Union,
“ cease and become void, and shall be so
“ declared to be, by the respective parlia-
“ ments of both kingdoms.”

The rights of sitting in parliament and
voting at elections, are *public* rights, and
cannot

cannot be possessed by an individual, but in virtue of a *public* possession, to the extent required by law for these purposes. He may alienate that extent, and, in consequence of his alienation, another may be entitled to enter a claim for the possession of those rights. But he cannot alienate that extent and retain those rights. Neither can he convey *directly* to another those rights, even along with the extent.*

The rules which regard the qualification of election, therefore, evidently appear to fall under the articles that have been quoted of the Union, in as much as they are *public* rules, and do not encroach in any degree on the *private* laws of the kingdom ;

* The conveyances on confidential votes, all bear an appearance of the granter having denuded himself of those rights ; which, a *bare* right of superiority being sufficient, is easily done, at the same time that the essentially valuable right of property may be retained by means of a disposition of the estate *in feu*.

kingdom; and the right of the eldest sons of the peers of Scotland to represent from that country in parliament being also a *public right*, falls undoubtedly within the provisions of these articles, and under those laws which concern *public right, policy, and civil government*.

Were the disqualification of the eldest sons of peers, which depends solely on a resolution of parliament, removed, what *private law* of Scotland would be thereby altered or affected? What private injury sustained? What individual could state damages? Had their ineligibility been even enforced by a *statute* of the Scottish parliament, it is also removable in terms of those articles of the treaty of Union above mentioned, without *infringing*, in the smallest degree, on that treaty, where it is expressly provided, that the *laws* which concern public rights, policy, and civil government,

vernment under which it has been already shewn that their disqualification falls, may be made the same in both kingdoms; and were the rights of *electors* of a private nature, even those laws which concern private right, may, in virtue of that treaty, be altered by the parliament of Britain, when for the utility of Scotland.

Again, the disqualification of the eldest sons of Scotch peers to elect or be elected to parliament, very materially affects those *equalities* so strongly provided for in the 4th article of the Union: for the argument upon which the counsel for the freeholders laid the greatest stress in 1708, the dangerous influence of the peers of Scotland on the elections from that country, would not have disqualified the eldest sons of the peers of England, whose fathers did not possess property in Scotland, and who not only act as representatives of the
people

people in that country, but who may also be chosen for Scotland ; while the eldest sons of Scotch peers can sit in parliament only for England.* Nor can the eldest

sons

* In former times, the Attorney and Solicitor General in England were ineligible to the House of Commons, because they sat in the House of Peers to give their opinions on points of law. Blackstone, vol. i. p. 168 ; Hatsell, p. 16 ; Wight, p. 292. Their attendance there has now ceased, and they are eligible to the House of Commons. In the same spirit of equality that is here contended for, the Lord Advocate may be elected, who is Attorney General for Scotland.

Previous to the *Union*, not only the eldest sons, but the peers of Scotland themselves, as they may still do in Ireland, sat in the House of Commons of England ; Lord Dysart, who had in 1705 refused an offer of an *English* peerage, and Lord Falkland, both vacated their seats at that period, having become *peers* of Great Britain. Those of the peers of Scotland, who are not of the *sixteen*, may have thereby lost some privileges in consequence of the *Union*, but their eldest sons cannot have acquired any, by retaining a *right* which they formerly enjoyed ; nor can their right of sitting in parliament for England enter into the scale of *equalities* arising from the *Union*.

sons of Scotch peers be now considered as represented by their fathers, since even the peers sit in parliament only by representation, and since no person can properly be represented but he who enjoys the *privilege* of electing.

Injured by a deprivation of those *equalities*, they may, incontestibly, demand to be restored to their undoubted privilege and right. But not only are the eldest sons of the peers of Scotland injured in respect to those equalities, and that mutual participation of privileges provided by the 4th article of the Union to the inhabitants of both kingdoms: they are also marked out as a distinct and separate body of subjects, to whom *alone* the rights and privileges of Britons are refused. If they are charged with a crime, they are tried by commoners. They cannot even demand a jury composed of the eldest sons
of

of peers, being in every respect, during the lives of their fathers, in the eye of law, commoners; for the British constitution knows no distinction of subjects between *peers* and *commons*. They are, at the same time, the only body of British subjects who, without either holding public offices or lying under any disqualifying sentence by statute, are positively incapacitated from electing or being elected to parliament, from the place of their nativity; from that part of the united kingdom in which their property is situated, and with whose local interests they are best acquainted. The immediate heirs of great landed estates and parliamentary importance, and who may one day become members of the supreme judicatory of the empire, are, in Scotland, debarred from the best opportunities of acquiring a knowledge of the British constitution. In their native country, they are no more than spec-

tators of the first and most valuable privileges of Britons. No legal possession of property to any extent, can entitle them to the rights of their fellow citizens. There is no situation that can enable them to defeat or elude that political disqualification, while, in the course of fortuitous events, individuals, without being doomed to that act of injustice by their birth, may be subjected to it from succession.*

Upon

* Two instances of a latitude in the explanation of that disqualification of the eldest sons of the peers of Scotland have occurred since the Union.

In 1720, William Lord Strathnaver, eldest son of the Earl of Sutherland, predeceased his father, and left a son, William. In 1724, this William, then calling himself Lord Strathnaver, was elected to represent the county of Sutherland, and his right to sit in parliament was ascertained in respect that the disqualification of peers eldest sons was *exceptio stricti juris*. He continued to represent that county until 1733, when, on the death of his grandfather, he became Earl of Sutherland. In what respect can an eldest son, born in lawful wedlock, on the death of his father, *ad pacem et fidem regis*, be considered in point of public right

or

Upon the whole, it appears, that by the original constitution of the Scottish parliament,

or privilege, in a different situation from his father? It is an established maxim in law, that the heir is considered as in the same situation with the deceased, and bound to encounter the whole consequences of that situation. *Hæres est eadem persona cum defuncto.* On what principle is the determination of the House of Commons, in the case of Lord Strathnaver, to be accounted for, or explained? It cannot have been affected by the peculiarity in the county of Sutherland above-mentioned, of *vassals* enjoying the right of voting; and it is but fair to suppose, that their opinion was founded upon more liberal grounds than merely, that in the resolutions disqualifying the eldest sons of peers, the *grandsons* of peers had not been expressly inserted.

William Marquis of Tullibardin, was attainted in 1715. His father, John Duke of Athol, obtained an act of parliament in 1716, conveying the honours of Athol to James his second son, who was member for Perthshire, at his father's death in 1724, when he became Duke of Athol. His brother William lived many years after. *Douglas's Peerage of Scotland, titles of Athol and Sutherland.* And again, the forfeiture of the father has removed the disqualification of the eldest son. General Fraser, eldest son of the

the

liament, all tenants, in *capite*, of the crown, were bound to give personal attendance in parliament; that those acts of the legislature which first dispensed with the personal attendance of the smaller freeholders in Scotland did not disqualify them from attending, but relieved them from the obligation of doing so, on condition of their sending representatives; that those acts of parliament respecting the right of voting at their elections, which were passed after the establishment of parliamentary representation, and the introduction of *personal* titles of peerage confirming HEREDITARY seats in parliament, with respect to the *eldest sons* of peers, are silent; and particularly, that the act 1661, c. 35, excepts only the *great barons* or *peers*, who had not been disqualified

the late Lord Lovat, represented the county of Inverness in parliament, from 1768 to his death in 1782, when he was succeeded in that representation by his brother, the Hon. Archibald Frazer of Lovat.

qualified by any former act, from voting at elections, and who, sitting *personally* in parliament, were equally *incapable* of electing or of being elected. It appears also, that the resolutions of 1685, 1689, and 1708, disqualifying the eldest sons of peers, were passed upon grounds wholly foreign from those of legality and justice, which, indeed, do not appear to have been taken into consideration; that their disqualification was not established at the *Union*, but, on the contrary, their right of parliamentary representation *positively* maintained, since no *statutory bar* existed against them, and they were formerly bound, when tenants in *chief*, to give personal attendance in parliament.

The introduction of representation cannot have annihilated their parliamentary rights and importance, which cannot be destroyed (for in justice they could not be taken

taken away) without a positive statute. Even if such an arbitrary statute had been enacted by parliament, it might by another act of parliament be reversed; but much more easily may their *elective* capacity be restored when no such statute exists. The evil tendency of the causes on which the resolutions setting aside the eldest sons of Scotch peers in elections were enforced, have happily ceased to take place: and the abolition of the *heritable* jurisdictions in Scotland, must have completely removed that jealousy of aristocratical influence which formerly prevailed, perhaps not without reason, in that country. The eldest sons of the Scotch peers, therefore, entertaining a firm confidence in the justice of the House of Commons, to whose determination the point in question, the merits of which are yet untouched and entire, was left at the Union, have reason to expect that they will reverse the disqualifying resolutions
above

above stated, and restore them to the exercise of those rights, which in the character of *tenants* of the crown they formerly enjoyed, and to which they are now entitled as British citizens and subjects.

As the eldest sons of the Scottish peers were deprived of a valuable privilege, by a resolution of the House of Commons in 1708, so the peers themselves were not only marked out by a resolution of the House of Lords in 1711, as the only order of men within the empire, on whom the sovereign could not confer the highest mark of his royal favour, the *dignity* of the British peerage, and of an hereditary seat in the legislative assembly of the nation, but the undisputed *prerogative* of the crown was also most unjustly infringed.* Every peer of England was ca-

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pable

* Nor was this the only hardship that was imposed on the peers of Scotland, in consequence of the *Union*. They were

pable of being raised to a higher degree of rank: every commoner in Britain was capable of being ennobled, or, if duly qualified, of representing his countrymen in the House of Commons. But the peers of Scotland were to remain for ever in the same situation in which they stood at the Union, and their eldest sons were to be incapable of representing either the counties, or burghs of that country in parliament. Such were to be the rewards of their yielding up their privileges, and their honourable and independent situations, at the shrine of the *national* welfare!

and

They were to meet at their elections without a *protest*; and, on an equality of votes, they had not the means of determining them: they were not to possess an open *record* of their proceedings: they were not at these meetings to question the right of any person to the *title* upon which he claimed as a peer to vote, nor to arraign, except by an *ineffectual* protest, the disqualifications of voters, however apparent; and a baneful *premunire* was extended over their conduct when assembled at the elections.

and such the returns to that patriotic sacrifice, without which, Scotland might have still laboured under aristocratical tyranny, and England have been thrown, on manifold occasions, into a state of danger and confusion !

But a sentence founded in the paroxysm of political jealousy, could not support itself for ever under the eye of judges so highly distinguished by a spirit of justice and honour, as the British House of Peers; and the capability of the Scottish of being invested with the dignity of the British peerage, has been lately acknowledged and ascertained,* This indeed was a brilliant

Q 2. instance,

* It is to be observed, at the same time, that no instance has as yet occurred, of a peer of Great Britain being created from a *barony* situated within Scotland: though this undoubtedly would not be unconstitutional or illegal, as the kingdoms of England and Scotland, in virtue of the Union, now form equally *one* kingdom, that of Great Britain. Yet the impeachment of Warren Hastings, Esq. is now carried on in name of the *commons* of England only.

instance, and a natural effect of that progressive spirit of candour, liberality, general accuracy, and improvement which happily distinguish the eighteenth century, but in no nation on earth more than in Britain. It was the same elevated spirit of justice and reason that abolished, in Scotland, the privy-council, and those remnants of oppression, the hereditary jurisdictions; and which, in Britain, established the judges in their offices during good behaviour and for life.* This great and generous principle has not yet spent its force. It will still be extended to the just demands of both shires and burghs now before parliament, from Scotland. And as the injustice that was done to the eldest sons of the peers of that country, when they were interdicted from their

positive

* A complaint in the claim of right from Scotland at the Revolution against the government of king James, exhibits his having changed the commissions of the judges *ad vitam aut culpam*, into commissions *durante bene placito*.

positive right of parliamentary representation, was not less than that which was done to the peers themselves, when they were held incapable of receiving whatever *mark of favour the free will of the sovereign might bestow* : the remedy, it is to be hoped, though somewhat later, will not be *less* effectual.

It was but the other day that the peers of Scotland, not of the sixteen, or their sons, were included in the *order* of admission within the *body* of the House of Lords. Was it because they were *ineligible* to the House of Commons that they were admitted? Was that the reason why the noble mover of the motion would not at first extend its effects to their sons? Or is that the reason why the sons of the peers of England are admitted within the body of *that house*?

If

If the same influence which annihilated in Scotland the parliamentary consequence of the small proprietors, on the question that forms the subject of these observations, shall still sway the *voice* of her commissioners in the House of Commons; if they shall say,

———*Quis te juvenem, confidentissime, nostras,
Jussit adire domos? Quidve hinc petis?*———

that disadvantage, it may reasonably be presumed, will be more than counterbalanced to the *eldest sons* of her peers, by the prevailing numbers, and the free and liberal genius of the English.

A P P E N D I X.

No. I.

*Part of a Letter from Thomas Randolph to
Sir William Cecil, dated August 10, 1560.*

THE barons, who, in time past, have been of the parliament, had yesterday a convention among themselves in the church, in very honest and quiet sort. They thought it good to require to be restored unto their ancient liberty, to have voice in parliament. They presented that day a bill unto the Lords unto that effect, a copy whereof shall be sent as soon as it can be had. It was answered unto gently,
and

and taken in good part. It was referred unto the Lords of the Articles, when they are chosen, to resolve thereupon.

Petition of the Lesser Barons to the Parliament held in August 1560, transmitted by Thomas Randolph to Sir William Cecil, in his letter of the 15th of that month.

MY LORDS, unto your Lordships humbly means and shows, we the barons and freeholders of this realm, your brethren in Christ, that, whereas the causes of true religion, and common well of this realm, are, in this present parliament, to be treated, ordered, and established, to the glory of God, and maintainance of the commonwealth, and we being the greatest number, in portion, where the said causes concern, and has been, and yet are, ready to bear
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the greatest part of the charges thereuntill, as well in peace as in war, both with our bodies and with our goods, and seeing there is no place where we may do better service now than in general councils and parliaments, in giving our best advice and reason, vote and counsel, for the furtherance thereof, for the maintainance of virtue, and punishment of vice, as use and custom had been of old, by ancient acts of parliament, observed in this realm, whereby we understand, that we ought to be heard to reason and vote in all cases concerning the commonwealth, as well in councils as in parliaments, otherwise, we think, that whatsomever ordinances and statutes be made concerning us, and our estate, we not being required and suffered to reason and vote at the making thereof, that the same should not oblige us to stand thereto: therefore it will please your Lordships to take consideration thereof, and of

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the charge born, and to be born, by us, since we are willing to serve truly to the common well of this realm, after our estate, that ye will, in this present parliament, and all councils where the common well of the realm is to be treated, take our advice, counsel, and vote, so that, without the same, your Lordships would suffer nothing to be passed and concluded in parliament, or councils afore said, and that all acts of parliament made, in times past, concerning us, for our place and estate, and in our favour, be at this present parliament confirmed, approved, and ratified, and act of parliament made thereupon : and your Lordships answer humbly beseeches.

Of the success of this petition, the following account is given by Randolph, in a letter to Cecil, dated August 19, 1560.
 “ The matters concluded and past, by common consent, on Saturday last, in such
 solemn

solemn fort as the first day that they assembled, are these : First, That the barons, according to an old act of parliament made in the time of James I. in the year of God 1427, shall have free voice in parliament. This act passed without any contradiction."

No. II.

*The Names of the LL. and Burgeses of the
Parliament held in Scotland in August
1560.**

JAMES Duke off Chastellerault; James
Erle off Arran; Archibald Erle of
Ergyle; Jhon Erle off Athole; William
Erle *Marschal*; David Erle Crawford;
James Erle Mortoun; Alexander Erle *off*
Glencarne; Andro Erle off Rothes; Hew
Erle off Eglintoun; Gilbert Erle off Cas-
filis; Jhon Erle off Sutherland; George
Erle off Caithness; Jhon Erle off Men-
teith; Jhon Archibisshop off Sanct Andr;
Commendatare

* This parliament is not taken notice of in the public records; but the roll here given is taken from the Cotton Library; and the title is of the hand-writing of Secretary Cecil. See *Keith's History*, p. 146.

Commendatare off Paflay; Robert Bifchop off Dunkeld; William Bifchop off Dumblane; James Bifchop off Ergyle; Alexander Archibifchop off Athenis, Elect off Galloway, and Commendatare off Inchaffray; John Elect off the Ilis, Commendatare off Ycolmkyl and Archattane.

George Lord Gordoun; Jhon Lord Erskyn; Patrik Lord Ruthven; Alexander Lord Home; Jhon *Lord Lyndefay* off the Byris; William Lord Hay off Zestir; James *Lord Somerville*; William Lord Levingftown; Andro Lord Stewart off Ouchiltre; Alexander Lord Saltoun; Robert Lord Boyd; Robert Lord Elphinstoun; Jhon Lord Innermeith; Patrick Lord Gray; James Lord Ogylvie; Jhon Lord Glamis; Jhon Lord Borthuick: Allane Lord Cathcart; James Lord Sanct Johnis.

James

James Commendatare off the Priorie off Sanct Andros and Pettinweme; Jhon Commendatare off Abirbrothok; Robert Commendatare off Halyrudhows; Jhon Commendatare off Coldinghame; Jhon Abbot off Lundoris; Donald Abbot off Couper; Andro Commendatare off Jedburgh and Restenot; Marke Commendatare off Newbottle; Adam Commendatare off Dundrannen; Jhon Abbot off New Abbey; Commendatare off Dryburgh and Inchmahome; Postulat off Cambuskyneth; James Commendatare off Sanct Colmis Inche; William Commendatare off Culrofs; Walter Abbot off Kinlofs; Gawine Commendatare off Kilwynnyng; Nichol Abbot off Ferne; Robert Commendatare off Deir; Jhon Priour off Portmoak; Robert Commendatare off Sanct Marie Isle; Robert Minister off Faulfurde.

The

The commissaries off burrois, viz. Edinburgh, Striveling, Perth, Abirdene, Dundee, Air, Irwein, Hadingtown, Lynlythgow, Glasgow, Peblis, Jedburgh, Selkirk, Coupar, Kingorne, Banff, Forfar, Invernes, Montross, Kircudbright, Wigtoun, Innerkeithing.

Williame Maister *Merscheal*; Jhon Maister off Maxwel off Terriglis, Knycht; Patrik Maister *Lindesay*; Henry Maister Sinclare; William Maister off *Glencarne*; Hew Maister *Somervile*; James Douglas off Drumlangrig, Knycht; Jhon Gordoun off Lochinver; Alexander Stuart off Garleifs; Jhon Wallace off Cragye; William Cwninghame off Cwninghameheid; Jhon Cwinghame off Caprintoun; Jhon Mwre off Rowallane; Patrick Howstoun off that Ilk; George Buquhannane off that Ilk; Robert Menteith off Kerfs; James Striveling off Keir; William Murray off Tullibardin;

Tullibardin ; Andro Murray off Balwarde ;
 Jhon Wisheart off Pitarro ; Williame
 Douglas off Lochlevin ; Colin Campbell off
 Glenurquhard ; Williame Sinclare off
 Rosling ; Jhon Creichtoun off Stratharde ;
 Alexander Irwein off Drum ; Al-
 lardes off that Ilk ; Alexander Frazer off
 Philorth ; Williame Innes of that Ilk ;
 Sutherland off Duffus ; Jhon Grant
 off Freuchy ; Robert Monro off Fowlis,
 George Ogylvie off Dunlugus ; David
 Ogylvie off that Ilk ; Jhon Ogylvie off
 Innerquharite ; Ogylvie off Cloway ;
 Ouchterlony off Kelly ; Jhon
 Straithauchin off Thorntoun ; Andro Stra-
 ton off Lawriestoun ; Jhon Creichtoun off
 Ruthvennis ; Thomas Blair off Baltheock ;
 Ogylvie off Inchemertyn ; Thomas
 Mawle off Panmure ; Archibald Douglas
 off Glenbarve , Thomas Fottringhame off
 Powry ; Robert Grahame off Morphy ; Ro-
 bert Stewart off Rosslyth ; Walter Lundy off
 that

that Ilk ; Myreton off Cammo ; Ar-
 thure Forbes off Reres ; Andro Wod off
 Largo ; Jhon Kynneir off that Ilk ; Jhon Ed-
 meston off that Ilk, zounger ; Gilbert
 Wauchope off Niddrie Merscheal ; George
 Home off Spot ; Hamiltoun off Inner-
 weik ; David Home off Wedderburne ;

Nisbet off that Ilk ; Jhon Swintoun off
 that Ilk ; William Hamiltoun off Sanchar ;
 George Crawford off Lessures ; James
 Cockburne off Scraling ; Twedy off
 Drumelzear ; Hew Wallace off Carnel ;
 Robert Lyndesay off Dunrod ; Robert
 Maxwell off Calderwood ; Patrik Ler-
 month off Derfy ; Jhon Carmichael off
 that Ilk ; Jhon Carmichael off Meadowflat ;
 George Haliburton off Petcur ; James
 Haring off Glasclune ; Stewart off
 Grantuly ; Jhon Stewart off Arntully ;
 James Meinzeis off that Ilk ; Jhon Forrel
 off that Ilk ; Maister Alexander Leving-
 stoun off Donipace ; Jhon Cwninghame off
 Drumquhassil ; David Hamiltoun off
 S Fingaltoun ;

Fingaltoun ; Henry Wardlaw off Torry ;
 Ramsay off Banff ; James Heriot
 off Trabron ; Walter Kerr off Ces-
 furde ; John Kerr off Phernihurst ;
 Jhon Johnstoun off that Ilk ; Williame
 Dowglas off Quittinghame ; Neil Mont-
 gomery off Langschaw ; Patrik Mont-
 gomery off Giffine ; Montgomery
 off Hefil-heid ; Williame Cranstoun off
 that Ilk ; Thomas Macdowal off Mak-
 carlston ; Jhon Home off Coldingknowis ;
 Patrik Hepburne off Wauchtoun ; James
 Forestar off Corstorphin ; Jhon Sandi-
 landis off Caulder ; William Lauder off
 Haltoun ; Jhon Cockburne off Ormestoun ;
 George Brown of Colstoun ; James Sande-
 landis off Cruvy ; Baillie of
 Lamyngtoun ; Sir James Hamiltoun off
 Crawford ; Jhon Knycht ;
 Arbuthnot off that Ilk.

To these names are subjoined, by the
 person who sent the list to Secretary Cecil,
 the

the following words: ' With mony uthe-
 ' ris, baronis, freholdris, and landit men,
 ' but (i. e. without) all armour.' *

S 2

No.

* See Mr. Wright's Appendix, No. XII. containing a record of the parliament 1579, where the Earl Marishall and others appear by their procurators, *commoners*. After 1587, peers could only hold the *proxies* of peers. See act of parliament, 1617, c. 7, p. 37. *Peers* are also held to be incapacitated from following the profession of the *bar*; that is to say, they demand the privilege of *pleading* covered, and, in like manner as the *king's counsel*, within the bar of the court; but which, at least in Scotland, it is said, would be refused to them. If, however, this privilege, which is claimed by the peers, be an established privilege of peerage, no court of law can be entitled to withhold it. If this privilege is *not* established, ought the peers to demand it? Ought they to forfeit the advantages of an honourable profession on that ground? In whichever state this point may rest, the profession of the *bar*, which in this country is the direct road to the highest *honours* and preferment, is an object of great importance to those, at least, who do not possess an absolute and hereditary right of *sitting* in the supreme council of the nation. Although no instance of a peer having followed this profession may be given, would the courts of law be injured by this alteration? And is it even possible, that this chief glory and boast of the *Roman*, can be deemed improper, or illegal in the *British senator*?

No. III. p. 23, p. 27.

IN former times, all causes, whether civil or criminal, were tried in Scotland by jury, which, indeed, seems to have been a principle inherent in the feudal system.* The mode of trial by juries was established not only in the king's courts, but also in those of his vassals within their respective baronies. By degrees the king in his court, and the barons in theirs, assumed the power of determining the actions brought before them, without the assistance or advice of their vassals. The consequences that were to be apprehended from this practice, having escaped the attention of the people, actually took place. Juries in civil causes were wholly laid aside in

* Trial by *jury* might perhaps be traced to a more remote period, in the *original* connection between the inhabitants of the east coast and low country of Scotland, and those of the *northern* parts of Europe. See Mr. Miller's Account of the Saxon Government.

in both courts, and judges *ordinary* having been appointed in each jurisdiction, it has at length been established that their judgment is alone, and exclusively decisive; the baron, or feudal proprietor, having been prohibited from judging in his court in person, by 1747, c. 43.

The jurisdiction of the king's court underwent various changes. The power of the justiciar to judge in civil actions was, at one time, vested in the king's council; afterwards, in a committee of parliament called the session; which, at last, in the reign of James V. was established upon the model of the parliament of Paris, into the form, a few subsequent alterations excepted, which it now wears.* The king still retained his right of judging in that court :

* The number of the judges in that court, *fifteen*, with the power of *appeal* to the parliament of Scotland formerly, and now to the House of Lords, may, perhaps, in a very great degree, have indemnified the nation in her loss of juries in *civil* actions.

court: for, in the reign of James VI. that monarch, having, as heir to Archibald Earl of Angus, laid claim to the Earl's estate, was declared by the Court of Session to have a right of pronouncing sentence on the import of his own claim: and a similar power by 1681, c. 18, was renewed to Charles II. * This act also confirmed to the crown the right of a *cumulative* jurisdiction, which being complained of by the parliament at the Revolution, the act was repealed by 1690, c. 28,

In criminal offences, again, the office of coroner or crowner was of antient date in Scotland: and the form of inquiry into the fact by presentment and indictment by a grand jury, seems also to have been established.

* Erskine's Hist. of the Law of Scotland, p. 35, tit. 3. Craig de Feud. lib. 3. dis. 7. c. 12. For a particular history of the powers of the Court of Session, see Stuart's Observations on the Public Law of Scotland.

tablished. Various alterations have like-
 wise taken place, in that country, in the
 forms of the criminal law, and different
 commissions have been appointed for that
 purpose. The act of parliament 1587, c.
 82, provides that justice eyres shall be held
 regularly over the kingdom twice in the
 year, when the criminals are to be tried by
 an assize. That act further appoints a
 commission, consisting, in each county, of
 a " fixed number of honourable and wor-
 " thy persons, being knawen of honest
 " fame, and esteemed nae maintainers of
 " evil or oppression, and, in degree, earls,
 " lords, baronnes, knights, and special
 " gentlemen landed; quhilk fall be the
 " king's commissioners and justices in the
 " furtherance of peace, justice, and quiet-
 " nefs; together with four of the council
 " of every burgh, within the selfe; quhilk
 " fall be constant and continual up-
 " takers of dittay (an inquiry into the
 " trespasss)

" trespass) giveand, grantand, and com-
 " mittand unto them, full power to take
 " inquisition, and make dittay by their
 " own knowledge; or by *an sworn inquest*,
 " i. e. jury, or sworn particular men, of all
 " persons suspected capable of the crimes
 " and defaults contained in the tables, to
 " be made by the treasurer, justice-clerk,
 " and advocate, annexed to the present
 " act divided in twa sorts, &c." And
 these commissioners are further ordered to
 give in the trespassors of the first list, or
 higher crimes, to the *crowner* of the shire,
 to be put upon trial at the next justice
 eyre; and to meet at the head-burgh of
 the shire, four times in the year, when
they are authorized to try and judge the
 offenders of the second or inferior list of
 crimes, with power to issue their precepts
 to the sheriffs to summon *assizes*, &c.

At present, the sheriffs of the counties,
 and the justices of the peace in the neigh-
 bourhood,

bourhood, are in the use and practice of inquiring into the fact, and taking declarations without the assistance of an inquest or jury, upon the perpetration of any of the higher list of crimes, and transmitting that inquiry or precognition to the Lord Advocate, or his deputies, of which he has three, and who, with the Solicitor General of Scotland, alone determine concerning the propriety of bringing the party accused to trial. The grand jury is entirely laid aside; and all criminal prosecutions are carried on at the suit and expence of the crown. The Lord Advocate is the Attorney General of Scotland; and, his power, in all criminal cases whatever, is similar to that exercised by the Attorney General in England in informations *ex officio*. He may suffer the guilty to escape, and, under a pretence of justice, he may harass the innocent. He is under no obligation to bring any accusation to a trial. He is liable

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to no penalty if he declines to prosecute any person suspected of a crime, however strong the presumption of his guilt. He may find a precognition justifiable of trial in one instance, and not in another, though perfectly similar: he can detain the party accused in confinement, and, upon the eve of a trial, desert the diet either *pro loco et tempore*, or wholly; and, all this without assigning any reason whatever for his conduct. Nor can this powerful dictator be sued for wrongeous imprisonment. The party accused, however, has the form of criminal letters, a species of *habeas corpus*, by which it is in his power to bring on his trial, when he has reason to apprehend that his confinement will be lengthened by a desertion of the diet or trial *pro loco et tempore*.

By the law of England, the bill of indictment expresses the degree of culpability

lity which the prisoner has incurred in the *act of killing*. The jury have the right of finding, or determining concerning the existence of that degree of culpability; and, if he has only committed man-slaughter, he will not be found guilty of murder. But in Scotland, the distinction which formerly took place in those crimes, ceased in consequence of the act 1661, c. 22. And there is no legal distinction remaining between culpable homicide, *i. e.* man-slaughter, and murder. Both crimes are indicted in that country as murder; and, the jury, when they see that the crime charged, actually amounts to murder, find *guilty or proven*. But when the act of *killing* appears not to have proceeded from *forethought intention*, but of *a sudden*, and that the crime which has been committed amounts only to *homicide*, the jury are under the necessity of finding *not proven*. As

the libel or charge makes no distinction in the crimes, the jury are unwilling to trust the judgment on their verdict in the breast of the court ; and chuse rather to suffer an offence against society to escape unpunished, than to risk the *life* of the prisoner on the humanity of the judge. And that would inevitably be endangered by their finding the libel *proven*, the charge always concluding for the punishment inflicted on the crime of murder.

But, ought not the charge or libel to express the degree of criminality for which the prisoner is arraigned? And might not that privilege of determination and distinction in accusations of murder, and culpable homicide, be restored to juries in Scotland by act of parliament, without prejudice to the dignity of her judges, or to the vindication of that infringement of the

the

the laws of society which is occasioned by the crime of man-slaughter.*

Many

* The want of distinction in the criminal law between murder and culpable homicide, was lately corrected by the court in the following instance : In the libel at the instance of " John and William Stewarts, against lieutenant George Storey, for the murder of William Stewart, surgeon, in Paisley, the jury conform to the recommendation of the court, returned the following verdict : " All in one voice find the pannell, George Storey, *not* guilty of the murder libelled, but at the same time find him *guilty of culpable homicide.*" He was accordingly fined, and imprisoned for some months. Records of Justiciary, January 1785.

It is respectable to find the judges of a country express an anxiety for the security and liberty of the subjects, and the due administration of the laws. These sentiments were in the above trial established, and it is an instance in an enlightened age. Still, however, the opinions of mankind are fluctuating, and the evil of the criminal law, in correction of which, the recommendation from the court above-mentioned was at the time given, ought not to depend upon the fluctuation of opinion, or the direction of a judge, when the direct avowal of that *faculty of juries* can be established, and restored to them by act of parliament. Those acquainted with the history of the criminal

Many other offences are tried, and heavy punishments inflicted in Scotland, without the form of a jury: nor has the prisoner, when tried by a jury, the privilege, as in England, of challenging a certain number of his jurors without assigning a cause.

The juries in Scotland consist of fifteen, and a bare majority of voices acquits or condemns the prisoner. The minority have also the privilege of recording their reasons of dissent. Since the prisoner is denied the privilege of challenge to his array, without investigating the reason why a *unanimity* in the *verdict* has been established in England, or altering the principle

of procedure in Scotland, will remember, to what a degree of oppression the doctrine, "that juries were only to enquire into the *facts* libelled, and that the *courts* were in all cases to determine to what *degree* of criminal turpitude those facts might amount," was carried in that country some years after the *Restoration*,

ciple upon which the contrary practice has been adopted in Scotland, might it not be proper in all cases, in order to correct the danger which in a narrow country may arise from that *near* majority, to require a greater concurrence---suppose two-thirds of the jury, as is the practice in courts-martial, to infer *capital* punishment. At the same time a smaller majority finding guilty, might still subject to a *more* restricted penalty, or *acquit*, as at present : and indeed the criminal statute book of Scotland requires almost a universal revival.* Many laws still remain in force, the severity of whose penalties disgrace her statute book, although prosecutions on them have fortunately for some time past fallen into disuse.

By the laws of the republic of Iceland, which exhibit an epitome of the originally
free

* The Court of Justiciary delivered, the 19th March, 1783, a solemn opinion, that in Scotland, in *criminal* actions before *inferior* courts, in cases short of *capital* punishments, trial by *jury* is not requisite. " Yet in all trials whatever before the Court of Justiciary, (the supreme criminal court in Scotland) *juries** are requisite." See *Arnot's Crim. Trials*.

free genius of the European governments, and which are soon to be published in English by the very learned professor Thorkelyn of Copenhagen, the number of jurymen varied with the nature and magnitude of the crime. And the person accused had it in his power to object to, and set aside, not a certain number only, but even the whole of the jury proposed, and to demand another.

The number of persons of which juries by the feudal system were composed, was at first undetermined and irregular in all countries where that form of trial had been established, sometimes more, sometimes fewer, but at length came, in each kingdom, to consist of a fixed number. “ And from
“ accidental circumstances of little impor-
“ tance, a different number has been esta-
“ blished in different countries ; as that of
“ twelve in England, and as has been above
“ observed, of fifteen in Scotland.”*

In

* It is uncertain whether that number *fifteen* arose from the same number of judges in the Court of Session, or whether

In the parliament of Scotland, the peers and commissioners of shires were held as one estate; and their votes in that assembly were collectively called. These, with the landed barons who elected, and were eligible to parliament, were held *pares curiæ* to each other, and sat mutually as jurymen on each other's trial.*

U

The

whether the members of that court were appointed to be *fifteen*, in imitation of the *jury*. Of old, juries in Scotland consisted of the number twelve. See *Leges Burgorum*.

* The gentlemen of landed property, or the lesser barons, in writings, formerly subscribed by the titles of their estates, and not by their names. In the trial of the Earl of Gowrie, and Robert Logan of Restalrig, the letters from Mr. Logan, produced in trial, are signed *Restalrig*.

That gentleman furnishes a strong instance of the state of those times. He had been concerned with Lord Gowrie in that unaccountable conspiracy against the life of King James VI. but had not been suspected; and he had been dead two years before the share he had in that affair appeared, and his son in peaceable possession of the estate. Yet, after that period, and in 1609, a summons of treason was raised against his son, to appear before the king and parliament, and to defend himself from the charge of high treason exhibited against his father.

In

The eldest sons of peers also sat as jurymen on the trials of both, and certainly for the same reason, namely, that they were held *pares curiæ*.

In Mr. Arnott's Account of Criminal Trials in Scotland, and in Mr. Wallace's Treatise on the Peerage of that Country, several lists of juries are given, from which it appears, that, in 1537, on the trial of John, Master of Forbes, at the instance of the Earl of Huntlie, for conspiring the life of King James V. the jury consisted of Robert Lord Maxwell, (Master of Nithsdale) William, Master of Glencairn, and thirteen gentlemen.

In

In the absurdity of law form, his father's bones were dug out of the grave, and produced in court to receive sentence. He was pronounced a traitor ; his estate was forfeited to the crown, and his son and family involved in ruin and disgrace. *Account of Criminal Trials, by Mr. Arnott.* The above privilege of *subscription* was taken away by 1672, c. 21.

In 1586, Archibald Douglas, cousin to the Earl of Morton, was tried as accessory to the murder of Lord Darnley, before a jury, of which Patrick, Master of Gray, was chancellor or foreman. Several persons were summoned to attend that jury, who absented themselves, and were fined each in fourteen pounds, among whom was Robert, Lord Seton, who was afterwards, in 1600, created Earl of Winton.

In 1609, the jury which sat on Lord Balmerino's trial consisted of nine lords of parliament, William, Master of Tullibardin, and five gentlemen. That before whom Patrick Stewart, Earl of Orkney, was tried in 1614, consisted of ten lords of parliament, William Lord Kilmaurs, (Master of Glencairn) with four gentlemen. And that before which John, Master of Tarbat, Ensign Andrew Mowat, and James Sinclair, writer in Edinburgh, were

tried for the murder of Elias Poirer, Sieur de la Roche, in 1691, consisted of the Lord Bargennie, a peer of parliament, and fourteen gentlemen; of which jury Sir William Ker of Greenhead, was appointed Chancellor,

As no opportunity has occurred of examining the records of criminal trials in Scotland, it is uncertain whether there be an instance or no of a peer's eldest son having sat since 1587, on the trial of a commoner, other than the son of a peer. They had so sat the preceding year; and from the lists above given, it seems clear that they were not disqualified, or declared incapable of exercising that privilege. They sat in 1609, and 1614, on the trials of peers; and, in 1691, a peer of parliament sat on the trial of the Master of Tarbat and two other gentlemen, without even being chancellor of the jury. Gentlemen commoners also sat on all those trials.

trials. It was as *pares curiæ* that these were entitled to sit on those juries; and, *vice versa*, the eldest sons of peers, and even peers of parliament did sit, and were entitled to have sitten on the trials of commoners. It is not therefore, that they are disqualified or incapacitated, it can be only *propter honoris respectum*, and in concurrence with the practice in England, that they have not been called upon since the Union to serve on juries.

It may perhaps be objected, “ That in
 “ Scotland there was a court for the
 “ trial of peers, distinct from the jury, who
 “ were to be fifteen; that the majority
 “ were to determine the verdict, the fact
 “ only being referred to the jury on as-
 “ fize. That the law is judged by the
 “ court; and that if the majority of the
 “ jurymen were peers, the rest might
 “ have been gentlemen.” But whatever
 weight

weight there may be in these objections, in certain cases, they cannot possibly hold good with respect to the jury before whom the Master of Forbes was tried in 1586: or in that before whom the Master of Tarbat and the other gentlemen were tried in 1691. The majority on these juries were neither peers, nor sons of peers. Now, either their eldest sons are to be tried as *peers*, or they must be, in *law*, *pares curiæ* to their *inquest*.

No. IV. p. 42.

AT the time when this act was passed, namely, in 1681, none claimed the privilege of voting, but those who were in possession of both the *superiority* and the *property* of their estates. But the abolition of the *heritable* jurisdictions having diminished the weight of the great proprietors, whether peers or commoners, such of them as were possessed of great estates, and extensive superiorities, instructed by the discriminating and inventive genius of lawyers, applied themselves to the recovery and extension of their influence in another manner. This they have been enabled, in a great measure, to effect, by the circumstance, that a public right to the bare *superiority* of land, is sufficient to entitle the holder either to elect or to be elected to parliament :

parliament : nay, even though that public right be no more than a right of *life-rent*, or of *wadset*, which last is a species of mortgage, defeasible often at pleasure, or within a few years, by the payment of the debt, on the part of the granter of the wadset. This debt is generally *nominal*, or, at most, a very trifling sum given, for the sole purpose of creating a freehold qualification. These freeholds seldom yield more than a few shillings per annum, while an estate of as many thousands of pounds, if not held *directly* of the crown, cannot entitle the proprietor to a single vote ; the parliamentary *patronage* of these estates being possessed by the *superior*. A forty shilling freehold, of old extent, when possessed in property, is an estate of less annual value than a freehold of four hundred pounds valued rent, when also possessed in property. But, as the act of the 16th of George II. c. 11, has provided, that these freeholds shall not now be
valid,

lid, unless they have been registered in the record of retours, previously to the year 1681, such freeholds are not, at this day, very frequent.* And when they are held in bare superiority only, the value of both kinds of *freehold* is equally nominal.

It may perhaps be questioned how far the acts of 1661, c. 35, and 1681, c. 21, were intended to remove the *bar* of *actual residence* within the shire, as provided by

X

1587,

* Scotland appears to possess a decided superiority over England, in her general and *accurate* record of all *rights* to landed property, and *mortgages* affecting it. If on the one hand, this record may tend at a time to prevent an exertion of *credit*, it will on the other afford a just situation and proper security to the *creditor*. *Private vices* are not always *public benefits*. A similar record has been some time established in England, in the county of Middlesex, and in two of the *Ridings* of Yorkshire only. It does not appear that it has tended to diminish the exertions of industry, nor to check great commercial speculations in these counties; and yet objections and prejudices are entertained against *instituting* a *general* record over the kingdom.

1587, c. 114; neither of these acts of parliament repealed that provision; but it seems to have fallen into disuse, and was omitted in these acts, and in that of 16 Geo. II. &c.

The evil of these fictitious freeholders, excessively multiplied, has now risen to the height: and a general opinion prevails in Scotland, that they ought to be abolished. But, while some declare themselves only for the *abolition* of life-rent and wadset votes, others are also desirous of obtaining an increase of voters, by *reducing* the extent of valued rent requisite to form a qualification, though still retaining the restriction of holding that valued rent directly, and *in capite*, of the crown; with this alteration, that the voter shall be in possession, *bona fide*, of both the *superiority and property* of that estate upon which he shall claim to vote, and that the vassal shall

shall be entitled to *purchase* the superiority of his estate from his superior, and so be enabled to become a crown vassal or tenant *in capite*.*

X 2

Although

* By this proposal, which will attach to any *qualification quantum* whatever, *that hardship* which superiors, within the shire of Sutherland, were subjected to by 16 Geo. II. c. 11, § 20, in being deprived of a recompence and *value* for their superiorities, will be avoided; and *vassals* will be enabled, without an improper condition, to enjoy the privileges of *electors*. On this subject the following proposals are submitted to consideration.

I. That where the superior and vassal do not agree on the *price* to be paid for the purchase of the superiority, the *vassal* shall be entitled to apply to the *sheriff* of the county within which the superiority is situated, *who* shall, on proper *intimation* to the parties, appoint a *jury* to fix and determine the purchase price, upon which, and proper *consignation* of the price, the vassal shall be entitled to demand *investiture* of the superiority.

II. That where the said superiority is *entailed*, the *price* shall be vested in trustees to be named by the sheriff, for *behoof* of the heirs of entail.

This has already been appointed by 20 Geo. II. c. 50, when the superior chose to dispose of *entailed* superiority to his vassals.

III. That

Although it may not, from peculiar circumstances, be at present proper to extend,

III. That the vassal shall be entitled to compel a purchase of the *bare* right of superiority *only*; and the superior to be still entitled to retain and levy the *feu-duties* and *casualties* issuable from the estate.

IV. That when the vassal shall compel the sale of his superiority, or a *part* thereof only, the superior may insist on his purchasing the *whole* of his superiority within that county, *held* by him of that superior.

V. That this right in the vassal to purchase shall not extend to lands already feued, or to be feued of, for the *erection* of buildings within villages and towns, not *burghs* royal. It seems proper, from various reasons, that the superior should remain the *crown vassal* in such towns and villages; and were those *properties* held *directly* of the crown, the expence of completing *crown rights* is such, as would extend far upon their small value.*

Perhaps, where the superior levies, *bona fide*, as *feu-duty*, a certain proportion (say one *third* part) of the real *annual* value of the estate, the right of purchase in the vassal, to the *bare* right of superiority even, might in all cases cease.

* 1. It would tend considerably to the improvement of these towns and villages, and to the security of property within them, were sheriffs entitled to determine, under *appeal* to the Court of Session, in questions of *declarators*
of

tend, in Scotland, the privilege of voting
so far as in the sister kingdom; might it
not,

of property within their county, under a certain *fixed* value. These properties are often of very small value, and *litigation* in the supreme civil court is very expensive. Many small proprietors all over Scotland, besides those of towns and villages, " Whose harvests are but half a sheaf," would also be benefited in the *security* of their property by this proposed alteration.

2. These towns would also be improved, was a power similar to what is possessed, in virtue of 1663, c. 16, by the magistrates of burghs royal, given to their magistrates, by which they might be entitled to apply to the sheriff of the county, who, on proper notification and delay, as prescribed in that act, should order public sale of *ruinous* feued properties so complained of within them, and *con- signation* of the price for *beboof* of the heirs, after paying all arrears and expences; and that the sheriff should *authenticate* the purchase.

Nothing can tend in a greater degree to prevent *new settlers*, or to discourage the inhabitants, than the *want* of industry, which the appearance of these *ruinous* buildings exhibit in these towns and villages. The sheriffs in Scotland are judges appointed by the *crown*, for life: 1747, c. 43.

3. In burghs royal, the *town-clerk* gives, under a moderate *fee*, *seisin* (possession) of property situated within the borough, and keeps a record of *seisins*, wherein they are inserted at *one-half* the expence of other registers: 1681, c. 11. In these other towns and villages a *notary publick* is required, nor can the *seisins* be recorded but at *double*

not, however, tend to excite and diffuse a more general and lively spirit of industry and improvement, than has hitherto prevailed in that kingdom, to admit a greater number of proprietors to the rights of election? And would not this produce a more general concern for the public welfare? If such an increase of voters as is proposed, should ever take place, might not the rights of parliamentary election and representation be extended to the qualification necessary to the commissioners of supply? who, by law, must be possessed of one hundred pounds Scotch of valued

double the expence of those in burghs royal. Why subject their inhabitants to these inconveniencies? Let a *record* be kept for the purpose, in the sheriff-court of the county, upon *equal* terms with those of burghs royal; and let their *town-clerks* be entitled to *authenticate* and *attest* all *deeds* within these towns and villages. The *precept* to the *town-clerk* in burghs royal, issues from the *provost* or chief magistrate; in these towns and villages it would issue from the *superior*. And had these towns no *town-clerks* at the time, a *notary publick*, as at present, would still be entitled to give *possession*.

valued rent, a sum, which joined to the real property, will, on an average, raise an estate of fifty pounds sterling per annum.*

It may be also proper to consider, whether the powers now vested by act of parliament in the commissioners of supply in Scotland, namely, that of splitting valued rents, the preliminary step in creating parliamentary freeholds, and of proportioning the

* According to the present constitution of the law, as many persons may be appointed commissioners of supply upon the same parcel of ground, as there are sub-infeudations of that property: but the objection to what is proposed, arising from this circumstance, would be removed by the proposal which has been offered to the consideration of the public, for making it necessary that voters shall be invested with both the superiority and the property of their estates. It would also be an improvement, were the same united qualification made necessary to *acting* commissioners of supply. Erskine's Instit. p. 65, 8, 31.

the statutory assessments on the counties, do not entitle that class of men to be included in any extension of the right of voting which may be deemed necessary in that country ? The reason of requiring any qualification with regard to property in voters is, to exclude such persons as are in so mean a situation that they cannot be supposed to have any *free will* of their own. But, surely those who are possessed of the real property that usually accompanies 100l. Scotch of valued rent, are not included in that predicament. It is farther to be considered, whether such an extension of the right of voting as has been above recommended, would increase the number of freeholders within the shires, so much as to warrant the adoption of an *intermediate* qualification which has been proposed between *that*, and the present 400l. and whether there might be reason

son to apprehend, that more confusion would arise from the increase of voters, in consequence of the extension above proposed, at the meetings of election, than what may now happen at those meetings at which all the commissioners of supply are entitled to attend?

The county elections in Scotland are determined at one sitting, and without continuation of a *poll*. It does not appear that the extension under contemplation would increase the number of voters so much as to occasion any such alteration in the forms of election: and, if it did, it would remain to be considered how far, and by what sacrifices that alteration was to be avoided.

It has been already observed (see page 65) that no redress took place in conse-

Y

quence

quence of the *complaint* made by the burgesſes at the Revolution. One act of parliament was indeed immediately paſſed, 1689, c. 22, by which a *poll election* of magiſtrates was ordered, excluding from the right of voting, honorary burgesſes and beidmen, that is, penſioners of the burgh. But this act of parliament was ſo framed as to ſerve *only* for that one election; and theſe magiſtrates, ſo choſen, in the next year again appointed their ſucceſſors in office.

Several acts of the parliament of Scotland appoint theſe magiſtrates to account for their expenditure of the funds of the burghs, at the ſuit of the burgesſes; and, it is believed, that the *charters* of the burghs convey the ſame obligations; yet theſe acts of parliament are ſaid to have *preſcribed*, the meetings of *head-court* had become

become a mere farce, and their magistrates have successfully, as yet, resisted every attempt in the courts of law in Scotland, to oblige them to render an account of their management of these funds.*

Y 2

No.

* Their only remedy, therefore, now seems to be by application to parliament; and it were well, that it was also again enacted in the bill which the burgeses are now allowed to bring in "for Regulating the *Internal Government* of the Royal Burghs in Scotland," that *actually* resident and real burgeses should *alone* be entitled to hold the higher offices of magistracy within burghs, *a point which is perfectly distinct from that of their parliamentary representation.* This should also be enforced by a penalty. The act 1535,* c. 26, which formerly appointed the same qualification, and also that the magistrates should account *annually* in the Exchequer, had been rendered entirely ineffectual from the omission of the *penalty*. And such a regulation indeed appears to be the great prevention of *inattention* to the duties of office, or of *jobbing* in future the *common good* of the community. A stranger, or person unconnected with the burgh, can desire to be in the magistracy from *interested* motives alone.

* By 1609, c. 8, noblemen and gentlemen landed were *again* prohibited from officiating as magistrates in burghs royal, *but with equal effect.* p. 48.

No. V.

Extracted from the Minutes of the Parliament of Scotland.

Minute of Parliament, 24th Jan. 1707.

THEN the debate mentioned in the former day's minute was resumed, anent what proportions the barons and burrows shall have of the 45 members that are to sit in the House of Commons of Great Britain. And thereupon a clause was offered to be insert in the act, regulating the manner of electing the representatives of Scotland, in these terms, " And her Majesty with advice
" and

“ and consent aforesaid, statutes and or-
 “ dains, that thirty shall be the number
 “ of the barons, and fifteen the number of
 “ the burrows to represent this part of the
 “ united kingdom in the House of Com-
 “ mons of Great Britain; and that no
 “ peer, nor the eldest son of any peer, can
 “ be chosen to represent either shire or
 “ burgh in this part of the united kingdom,
 “ in the said House of Commons.”

And after debate upon the first part of
 the said clause, the vote was stated, “ If
 “ the number shall be thirty for the ba-
 “ rons, and fifteen for the burrows, yea, or
 not.” Thereafter, the vote was put, and
 it carried yea.

Minutes 27th January, 1707.

THEN the second part of the overture
 mentioned in the former day's minutes
 was

was again read in these terms, " And
 " that no peer, nor the eldest son of
 " any peer, can be chosen to represent
 " either shire or burgh of this part of the
 " united kingdom, in the said House of
 " Commons." And after debate there-
 on, another clause was offered in these
 terms, " Declaring always, that none
 " shall elect nor be elected to represent a
 " shire or burgh from this part of the unit-
 " ed kingdom, in the parliament of Great
 " Britain, except such as are now capable
 " by the laws of this kingdom, to elect or
 " be elected as commissioners for shire or
 " burgh to the said parliament."

After further reasoning thereon, the
 vote was stated; " Approve of the first
 " clause, or of the second, but before vot-
 " ing, it was agreed, that the votes be
 " marked, and that a list of the members
 " names, as they vote, be printed and re-
 ed,

“ corded, and the Lord Chancellor was al-
 “ lowed to have his name printed and re-
 “ corded amongst those who voted for the
 “ second clause.”

Then the vote was put, “ Approve of
 “ the *first* or of the *second clause*,” and it
 carried *second*.

State of the Vote January 27th, 1707.

S E C O N D.

<i>Nobility.</i>	<i>Nobility.</i>
Lord Chancellor,	Earls Loudon, Se-
Earl of Finlater	cretary
and Seafield	Crawford
Marquis of Mon-	Errol
trose, P. S. C.	Marischall
Dukes Hamilton	Sutherland
Argyle	Roths
Marquis Tweedale	Morton
Lothian	Buchan
Earl Mar, <i>Secretary</i>	Glencairn
	Earls

Nobility.

Earls Eglintoun

Caithness

Wigton

Roxburgh

Haddington

Galloway

Lauderdale

Wemyss

Dalhousie

Finlater

Leven

Northesk

Balcarras

Forfar

Kilmarnock

Kintore

Dunmore

Marchmont

Hyndford

Cromarty

Stair

Nobility.

Earls Roseberry

Glasgow, *Treasurer's Deputy*

Hopetoun

Ilay

Viscount Kilfyth

Lords Forbes

Saltoun

Sempill

Elphinston

Oliphant

Ross

Torphichen

Balmerino

Blantyre

Frazer

Bargeny

Banff

Elibank

Belhaven

Duffus

Lords

Nobility.

Lords Rollo
Colvill
Kinnaird

Nobility.

Lord Register, Sir
James Murray of
Philiphaugh, knt.

 61

Barons.

Sir Robert Dickson
of Inveresk

Sir James Foulis of
Colinton

William . Morrison
of Prestongrange

Barons.

Mungo Graham of
Gorthie

Alexander Douglas
of Sagleshaw

 5

Burrows.

John Scrimzeour
Lieut. Col. John
Erskine
John Muir

Burrows.

Patrick Moncrieff
Sir Andrew Hume
Sir James Smollet
Capt. Daniel Mac-
leod

Z

Sir

Burrows.

Sir David Dalrymple

John Clerk

John Ross

Sir Alexander Ogil-
vie

Mr. Patrick Ogilvie

George Allardyce

Burrows.

William Alvis

John Urquhart

Daniel Campbell

Robert Douglas

Alexander Maitland

George Dalrymple

Charles Campbell

20

F I R S T.

Nobility.

Viscount Stormont

Nobility.

Lord Justice Clerk,
Adam Cockburn
of Ormiston Esq.

2

Barons.

Robert Dundas of
Arncliffe

Barons.

Sir John Lauder of
Fountain-hall
Andrew

*Barons.**Barons.*

Andrew Fletcher, of Saltoun	John Pringle of Hayning
William Nisbit, of Dirleton	William Baillie of Lamington
John Cockburn, yger. of Ormiston	George Baillie of Jerviswood
Sir R. Sinclair, of Longformacus	Jo. Sinclair, younger, of Stevenson
Sir John Swinton of that Ilk	James Hamilton of Aikenhean
Sir Patrick Hume of Renton	Mr. Al. Ferguson of Isle
Sir William Ker of Greenhead	W. Stewart of Castle- Stewart
Sir Gilbert Elliot of Minto	Mr. Jo. Stewart of Sorbie
Arch. Douglas of Cavers	Francis Montgome- ry of Giffen
William Bennet of Grubbet	W. Cochran of Kil- marnock

Barons.

Humph. Colquhoun
of Lufs.

Robert Stewart of
Tillicoultry

Sir John Houston
of that Ilk

Robert Rollo of
Powhouse

Thomas Sharp of
Houston

John Haldane of
Glen-Eafges

Sir Thomas Burnet
of Leys

Sir David Ramsay
of Balmain

William Seton,
younger, of Pitt-
medden

Alexander Grant,
younger, of that Ilk

Barons.

John Forbes of
Cullodden

Sir James Campbell
of Auchinbreck

James Campbell
younger, of Ard-
kinlafs

Sir William An-
struther of that Ilk

Thomas Hope of
Rankeillor

James Halyburton
of Pitcur

Alexander Aber-
cromby of Glas-
faugh

William Maxwell of
Cardinefs

Alexander Mackie
of Palgoon

James

<i>Barons.</i>	<i>Barons.</i>
James Sinclair of Stempster	Alexander Abercrombie of Tillieboddie
James Dunbar, younger. of Hemp-riggs	George Mackenzie of Inch Coulter
Sir Henry Innes, younger. of that Ilk	John Bruce of Kinross

<i>Burrows.</i>	<i>Burrows.</i>
Sir Patrick Johnston	John Hutchinson
Robert Inglis	Archibald Shiells
Walter Stewart	John Lyon
Hugh Montgomery	Mr. Dougal Stewart
Alexander Edgar	George Brodie
James Scot	Sir D. Cunningham
Sir John Anstruther	Jo. Carruthers
Sir John Erskine	George Home
James Spittle	Mr. Rorie Mackenzie
William Coltram	
Sir Peter Halket	Mr. Robert Fraser
William Carmichael	

(182)

FIRST.

SECOND.

Nobility	-	2	Nobility	-	61
Barons	-	47	Barons	-	5
Burrows	-	23	Burrows	-	20
		72			86

Majority 14



No.

N. B. In the proposal, (see page 163) that *vassals* should be entitled to *purchase* the superiority of their lands, their *right* of purchase should be competent against every *intermediate* superior, that may be *interjected* between the vassal and the crown, or prince. And whatever advantage, in the right of voting, may be granted to property, should *equally* extend to what may be *entailed*.

F I N I S.

ERRATA.

ERRATA,

1. Page 8, line 1st, read, *many* of the innovations, &c.
2. Page 12th, line 14th, after kingdom, add (*joined to the spirit of Clanship*) were displayed, &c.
3. Page 17th, *note*, add, See 1661, c. 1.
4. Page 29th, *note* line 5th, for *any* alteration, read *any such* alteration.
5. Page 48th, line 14th, read *may have* left, &c.
6. Page 96, *note* line first, for, in *that* measure, read, in *this* measure.
7. Page 125, line 4th, for *whatever*, read, *the greatest*.
8. Page 135, the eldest sons of peers were called *master* in Scotland, as the master of Glencairn, &c.
9. Page 182, *ad finem*, for No. read *N. B.*

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and are neither party nor interest
regions not in contact with
whole part of the
has led to a consideration of the
national privilege in question

38/101

